TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1900.

No. 162.

THE MOUNTAIN VIEW MINING AND MILLING COMPANY, APPELLANT,

vs.

W. D. McFADDEN, DAVID O'NEIL, CHARLES W. VEDDER, AND W. E. HARRIS.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

FILED DECEMBER 1, 1900.

(17,578.)

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., JULY 2, 1900.

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1 In the Circuit Court of the United States for the District of Washington, Eastern Division, April Term, 1898.

Be it remembered, that on the 13th day of January, 1897, there was duly filed in said circuit court of the United States for the district of Washington, eastern division, a record from the superior court, State of Washington, for Stevens county, in words and figures as follows, to wit:

STATE OF WASHINGTON, } ss:
County of Stevens, }

In Superior Court.

W. D. McFADDEN, DAVID O'NEIL, CHARLES W. VEDDER, and W. E. Harris, Plaintiffs,
vs.
THE MOUNTAIN VIEW MINING & MILLING COMPANY (a Corporation), Defendant.

Complaint.

Now come the plaintiffs in the above-entitled action, and complain of the defendant herein, and allege:

2 1st. That the plaintiffs and each of them are now, and at all times hereinafter mentioned have been, citizens of the United States.

2nd. That the defendant, The Mountain View Mining & Milling Company, is now, and at all times hereinafter mentioned has been, a corporation organized and existing under the laws of the State of Washington, having its principal place of business in the city and county of Spokane, in the State of Washington.

3rd. That the plaintiffs are now the owners of and entitled to the right of possession, and that during all the times since the 20th day of February, 1896, they and the grantor and predecessor in interest of the said C. W. Vedder, have been the owners of and entitled to the right of possession of that certain lode mining claim known as and called the Columbia Lode mining claim, situated on the north side of, and about one and one-quarter miles from, the Columbia river, and about two and one-half miles west of the town of Northport, in the county of Stevens, State of Washington, and being the same ground and premises sometimes called the Gray Eagle lode, said claim being fifteen hundred feet in length along the lode and three hundred feet in width on each side of the center of the vein and lode at the surface throughout the length of said claim, for that heretofore, to wit, on the 20th day of February, 1896, these plaintiffs, W. B. McFadden, David O'Neil, W. E. Harris and one O. E. Cox, the grantor in interest of the plaintiff, C. W. Vedder, each and all being citizens of the United States over the age of twenty-one years,

entered upon the said premises, the same being then and
3 there public lands of the United States open to location as a mineral claim, and vacant, unoccupied, and unclaimed; and then and there discovered therein a vein or lode of rock in place bearing gold, silver and other precious metals; and then and there located a mineral claim thereon, called by them the Columbia Lode mining claim, claiming fifteen hundred feet in length along said lode so discovered, and three hundred feet in width on each side of the center of said vein or lode at the surface throughout the length of said claim.

That thereupon the said locators posted a notice of location upon said claim at the point of discovery of said claim, and described the said location and marked the said location upon the ground, so that the boundaries thereof could be readily traced; and that thereafter, and on the 20th day of February, 1896, the said locators duly filed and caused to be recorded in the office of the county auditor of said county of Stevens a notice of location of said Columbia Lode mining claim, containing the names of said locators, the date of the location, and such a description of the claim so located, by reference to natural objects and permanent monuments, as to identify the same, and that said locators in all other respects complied with the laws of the United States and the laws of the State of Washington, and the local rules and customs of the miners of the district in which said claim was situated, governing the location and manner of recording mineral claims.

That the above-named plaintiff, C. W. Vedder, has succeeded by purchase and regular conveyance to all of the right, title and interest of the said locator, O. E. Cox, in and to the said Columbia
4 Lode mining claim, and that these plaintiffs, W. D. McFadden, David O'Neil, C. W. Vedder and W. E. Harris, and the said grantor of the said C. W. Vedder, have at all times since the location of the said Columbia Lode mining claim as aforesaid, complied with the laws of the United States and of the said State, and the local rules and customs of the miners of said district relative to the said district,— holding and working of mining claims on the public lands of the United States; and that by virtue of said discovery, location, recording and working of said mining claim, and the compliance with the laws of the United States and of the State of Washington, and the local rules and customs of the miners of said district, and the conveyance by said O. E. Cox to the plaintiff, C. W. Vedder, as aforesaid, these plaintiffs are now the owners of said mining claim and the whole thereof, and entitled to the exclusive right and possession thereof, as against all persons.

4th. That the plaintiffs herein are also the owners of and entitled to the right of possession of that certain other lode mining claim known as and called the Kruger Lode mining claim, situated on the north side of and about one and one-quarter miles from the Columbia river, and about two and one-half miles west of the town of Northport, in said county of Stevens, State of Washington, and being east of and adjoining the Columbia Lode mining claim herein described, and being the same premises sometimes called the Exchequer Lode

mining claim, said claim being fifteen hundred feet in length along the vein, and three hundred feet in width on each side of the center of said vein throughout the length of said claim, for that
5 heretofore, to wit, on the 20th day of February, 1896, these plaintiffs, W. D. McFadden, David O'Neil, W. E. Harris, and one O. E. Cox, each and all being citizens of the United States, over the age of twenty-one years, entered upon said premises herein described as the Kruger Lode mining claim, the same being then and there a part of the vacant, unoccupied and unclaimed public lands of the United States open to location and exploration, as mineral claims, and discovered therein a vein or lode of rock in place, bearing gold, silver and other precious metals, and then and there located thereon a mineral claim, claiming fifteen hundred feet in length along said vein or lode, and three hundred feet in width on each side of the center of said vein, or lode, at the surface throughout the length of said claim, and then and there posted at the point of discovery of said claim a notice of location thereof, describing said claim, and then and there marked said location on the ground so that the boundaries thereof could be readily traced; and thereafter, and on the 20th day of February, 1896, the said locators filed and recorded in the office of the county auditor in the said county of Stevens, a notice of location of said Kruger Lode mining claim, containing the names of said locators, the date of said location, and such a description of the claim so located, by reference to natural objects and permanent monuments, as would identify the claim, and fully complied with the laws of the United States and the State of Washington, and the local rules and customs of the miners of the district in which said claim was located, governing the location of mining claims.

6 5th. That the above-named plaintiff, C. W. Vedder, has by purchase and regular conveyance, succeeded to all the right, title and interest of the said locator, O. E. Cox, in and to the said Kruger Lode mining claim, and that those plaintiffs, including the said C. W. Vedder, and his grantor, the said O. E. Cox, have at all times since the location of said Kruger Lode mining claim fully complied with the laws of the United States and of the State of Washington, and the local rules and regulations of the miners of the said district governing the manner of locating, recording and working said mineral claim, necessary to hold the same; and that these plaintiffs are now the lawful owners and holders of said Kruger Lode mining claim and the whole thereof, and entitled to the exclusive right of possession thereof, as against all persons.

6th. That heretofore, to wit, on or about the — day of ——, 1896, the above-named defendant, The Mountain View Mining & Milling Company, without any right whatever, caused a pretended mining claim, called by it the Mountain View mineral claim, to be officially surveyed for patent, being the United States official survey No. 351; and caused such pretended Mountain View mine or vein lode to be so surveyed as to overlap and include and take in the following-described portion of the said Columbia Lode mining claim, the property of these plaintiffs, to wit: Commencing at corner No. 4 of

the official survey of the Mountain View Lode mining claim, survey No. 351, thence running north 37 degrees, east 1,180 feet to the point of intersection with the north side line of the Columbia lode; thence north 65 degrees and 50 minutes, east 90 feet to the northeast corner stake of the Columbia lode;
7 thence south 20 degrees and 30 minutes, east 520 feet, to a point on the southeast side line of said survey No. 351; thence south 29 degrees and 47 minutes and 44 seconds, west 130 feet, to the south side line of said Columbia lode; thence south 61 degrees and 30 minutes, west, along the south side line of the said Columbia lode, 900 feet to the south end line of the said survey No. 351; thence north 65 degrees and 45 minutes west along said end line 110 feet to corner No. 4, of said survey No. 351 and point of beginning, containing an area of 8.79 acres; so also as to include, overlap, and take in the following-described portion of the said Kruger Lode mining claim, the property of the seplaintiffs, to wit: Commencing at corner No. 2 of the official survey of the Mountain View lode, survey No. 351; thence running south 29 degrees and 47 minutes and 44 seconds west 640 feet to the southwest end line of the Kruger lode; thence north 20 degrees and 30 minutes west 520 feet, to the southwest corner of the said Kruger lode; thence north 33 degrees and 20 minutes east 260 feet to the north end line of said survey No. 351; thence south 65 degrees and 45 minutes east 381 feet to the point of beginning, containing an area of 4.42 acres.

7th. That theretofore, to wit, on or about the 20th day of September, 1896, the said defendant, The Mountain View Mining & Milling Company, filed in the United States land office, in the city of Spokane and State of Washington, an application for patent for said alleged Mountain View mining claim, survey No. 351, together with a plat and field-notes of said alleged Mountain View
8 mining claim, made by or under the direction of the United States surveyor general, showing the boundaries of the said alleged Mountain View mining claim; and also posted a copy of said plat, together with a notice of such application for patent, in a conspicuous place on the land embraced in said plat, and also filed in said land office an affidavit of two persons that said notice was duly posted upon said premises, and filed in said land office a copy of said notice; and that thereafter, and on the 1st day of October, 1896, the registrar of said land office published in the "Northport News," a weekly newspaper published nearest said claim, that said application for patent had been made, said notice being first published on the 1st day of October, 1896, and that said notice was published in said newspaper once in each week for ten consecutive weeks thereafter.

8th. That heretofore, to wit, on the 28th day of November, 1896, and within the sixty days' period of publication of said notice, these plaintiffs duly filed with the registrar and receiver of said United States land office, at said city of Spokane and State of Washington, their protest and adverse claim against said application for patent to the Mountain View mining claim, which protest and adverse claim was duly signed and verified by the affidavits of these

plaintiffs, protestants therein, and which said protest and adverse claim duly set forth the nature, boundaries, and extent of their said adverse claim, as required by law; and that these plaintiffs now, within thirty days after filing said protest and adverse claim as aforesaid, bring this suit in aid of their said adverse claim, and to determine the right of possession to said portions of the said
9 Columbia and Kruger Lode mining claims so as aforesaid included in the said survey and application for patent for the said alleged Mountain View mining claim.

9th. Plaintiffs further allege that heretofore, to wit, on or about the 1st day of July, 1886, and while these plaintiffs, W. D. McFadden, David O'Neil, W. E. Harris, and O. E. Cox, the grantor of the plaintiff, C. W. Vedder, were the owners of, and in the quiet and exclusive possession of, and entitled to the right of possession of, the said Columbia and Kruger Lode mining claims as aforesaid, the said defendant, The Mountain View Mining & Milling Company, wrongfully and without right entered into and upon the above-described portions of the said Columbia and Kruger mining claims, so as aforesaid included within the boundaries of the said survey No. 351, and ousted and ejected these plaintiffs, W. D. McFadden, David O'Neil and W. E. Harris, and the said O. E. Cox therefrom; and that the said defendant has at all times since and does now wrongfully and without right withhold the possession thereof from these plaintiffs.

10th. That the said survey of the said pretended Mountain View mining claim was made so as to overlap, include and take in the portions of the said Columbia and Kruger Lode mining claims, as above set forth, and the said application for patent by the defendant, as aforesaid, including the said portions of said Columbia and Kruger Lode mining claims, as aforesaid, and the prosecution of said application for patent, each and all are made without any right whatever, and constitute and are a cloud upon the title
10 and right of possession of these plaintiffs in and to the said portions of the said Columbia and Kruger lodes aforesaid, which cloud greatly embarrasses and damages the title of these plaintiffs in and to their said Columbia and Kruger lodes, and especially the portions thereof included within the said survey No. 351, and which cloud should in law and equity be removed.

Wherefore these plaintiffs pray and demand:

1st. For a judgment and decree of this honorable court adjudging the plaintiffs to be the owners of, and to be entitled to, the right of possession of all and singular those certain portions and parts of the said Columbia and Kruger Lode mining claims respectively, so as aforesaid included within the said application for patent, and within the said survey No. 351 as aforesaid, and to the whole thereof.

2nd. That the defendant's said claim and assertion of title thereto be adjudged to be void and without any right whatever, and that the said survey and application for patent be set aside and held for naught so far as the same in any manner interferes with the said Columbia and Kruger mining claims aforesaid.

3rd. That the plaintiffs have such other and further relief in the

premises as to the court may seem just and equitable, together with the costs of this action.

ALBERT ALLEN,
W. T. STOLL,
Attorneys for Plaintiffs.

P. O. address: Spokane, Wash.

11 STATE OF WASHINGTON, } ss:
County of Spokane, }

Charles W. Vedder being duly sworn, says: That he is one of the plaintiffs in the above-entitled action; that he has heard the foregoing complaint read and knows the contents thereof, and verily believes the same to be true.

CHARLES W. VEDDER.

Subscribed and sworn to before me this 26 day of December, A. D. 1896.

E. H. BELDEN,
Notary Public for Washington, Residing at Spokane, Washington.
[SEAL.]

(Endorsed:) No. 739. In the superior court of Spokane county, Washington. W. D. McFadden *et al.*, plaintiff-, *vs.* The Mountain View Mining & Milling Co. (a corporation), defendant. Filed Dec. 28, 1896. L. F. Ledgerwood, clerk. 511. Filed January, 1897, in the U. S. circuit court. A. Reeves Ayres, clerk, by James O'Neill, deputy.

12 THE STATE OF WASHINGTON, } ss:
County of Stevens, }

In the Superior Court.

W. D. MCFADDEN, DAVID O'NEIL, CHARLES W. VEDDER, and W. E. Harris, Plaintiffs,
vs.
THE MOUNTAIN VIEW MINING & MILLING COMPANY, Defendants.

Summons.

The State of Washington to the said The Mountain View Mining & Milling Company, defendant:

You are hereby summoned to appear within twenty days after service of this summons, exclusive of the day of service, and defend the above-entitled action in the court aforesaid, and serve a copy of your answer on the persons whose names are subscribed to this summons, at Spokane, State of Washington; and in case of your failure so to do, judgment will be rendered against you, according to the demand of the complaint which is filed with
13 the clerk of said court, a copy of which is herewith served upon you.

Dated this 28th day of December, 1896.

ALBERT ALLEN AND
W. T. STOLL,
Attorneys for Plaintiff-.

P. O. address: Spokane, Spokane county, State of Washington.

I, the undersigned, one of plaintiff-' attorneys, hereby certify that the foregoing is a true copy of the original summons issued in the above-entitled action, this — day of ——, 189–.

—— ——,
One of the Attorneys for Plaintiff.

STATE OF WASHINGTON, } ss:
Spokane County, }

I, John L. Harrington, being first duly sworn, upon oath say that I am and was on the date hereafter stated over the age of twenty-one years, and competent to be a witness in the above-entitled action, not being the plaintiff therein; that on the 28 day of December, 1896, at and in the county and State aforesaid, I served the original summons and complaint in said action upon the defendant The Mountain View Mining & Milling Company, therein named, by then and there delivering to Jacob R. Taylor, president of the defendant corporation, said defendant, personally, true copies of each said summons and said complaint, each and both certified to be such copies by W. T. Stoll, one of the attorneys for plaintiff-.

JOHN L. HARRINGTON.

14 Subscribed and sworn to before me, the undersigned, this 28 day of December, 1896.

S. P. DOMER,
[SEAL.] *Notary Public for Washington, Residing at Spokane.*

(Endorsed:) Case No. 739. Summons. In the superior court, Spokane county, Washington. W. D. McFadden, David O'Neil, Chas. W. Vedder, and W. E. Harris, plaintiffs, *vs.* The Mountain View Mining & Milling Co., defendant. Filed in superior court, Stevens county, Washington, Dec. 29, 1896. L. F. Ledgerwood, county clerk. —— ——, deputy. Filed Jan'y 13, 1897, in the U. S. circuit court. A. Reeves Ayres, clerk, by James O'Neil, deputy.

15 In the Superior Court of the State of Washington in and for the County of Stevens.

W. D. MCFADDEN, DAVID O'NEIL, CHAS. W. VEDDER, and W. E. Harris, Plaintiffs,
vs.
THE MOUNTAIN VIEW MINING & MILLING COMPANY (a Corporation), Defendant.

Petition for Removal of Cause.

Petition for removal of cause to the circuit court of the United States in and for the district of Washington, eastern division.

Your petitioner, The Mountain View Mining & Milling Company, respectfully shows to this honorable court:

That it is the defendant in this suit, which is of a civil nature; that the matter and amount in dispute in this case, exclusive of

interest and cost, exceeds the sum and value of two thousand dollars.

That the controversy herein is a suit of a civil nature arising under the Constitution and laws of the United States, brought in pursuance of the provisions of section 2326 of the Revised Statutes of the United States, providing for the filing of adverse claims against the application for patent for mining claims, and the bringing of suits in support of said adverse claims.

That on the 20th day of September, 1896, the defendant, The Mountain View Mining & Milling Company, filed in the
16 United States land office in the city of Spokane, in the State of Washington, its application for patent for the Mountain View Lode mining claim, together with the plat and field-notes of said mining claim made under the direction of the United States surveyor general for the State of Washington, and posted a copy of the said plat, together with a notice of said application for patent, on the land embraced in said plat, and filed in the said land office an affidavit of two persons that the notice was duly posted on said premises, together with a copy of said notice; on the first day of October, 1896, the register of the said land office published in the "Northport News," a weekly newspaper published nearest said claim, notice that said application had been made, said notice being published in said newspaper on the first day of October, 1896, and said notice was published once a week for ten consecutive weeks thereafter.

That on the 28th day of November, 1896, the plaintiffs presented to the register and the receiver of said land office at the city of Spokane, in the State of Washington, certain papers and documents intended as a protest and adverse claim against the application for a patent so made as aforesaid by the defendant, but which said pretended adverse claim did not show the nature, boundaries, and extent of said adverse claim as required by the provisions of section 2326 of the Revised Statutes of the United States, and by the rules 85 and 86 of the General Land Office of the United States governing the entry and patenting of mining claims upon the public domain of the United States, whereupon, by reason of the pretended
17 adverse claim not being in conformity with the laws of the United States and the rules of the General Land Office regulating the filing of adverse claims, said adverse claim was rejected and disallowed by said United States land office at Spokane in the State of Washington, and there is not now nor was there at the time of the filing of the complaint in this action, any adverse claim filed in the said United States land office against the application of the defendant for a patent for the said Mountain View mining lode claim, upon which to base, and in support of which to bring, this action. Yet notwithstanding the fact that there has been no adverse claim filed and allowed against the issuance of the patent to the defendant for the said Mountain View Lode claim, the plaintiffs assuming and pretending in their complaint that they had filed said claim against the application of the defendant for a patent, did on the — day of December, 1896, file with the clerk of the superior

court of Stevens county, in the State of Washington, a complaint wherein they alleged and pretended that the said complaint is filed in support of the said pretended adverse claim, and on the 28th day of December, 1896, the said plaintiffs did make and serve a summons upon the defendant demanding that it appear within twenty days after service thereof and defend said action in said superior court of Stevens county.

That upon the trial of this cause it will be contended by the defendant that this action cannot be maintained for the reason that it is not based upon an adverse claim properly made and filed under the provisions of section 2326 of the Revised Statutes of the
18 United States, for the reason that said adverse claim presented by the plaintiffs in the United States land office, wherein said application for patent for the mining claim of the defendant was pending, was properly refused and rejected by said land office for the reason that the requirements of rule 85 of the rules of the General Land Office of the United States in force at the time of the presentation of said adverse claim was not complied with, in that the said adverse claimants did not present or file with said adverse claim any certified copy of the location notices of either of the claims upon which said adverse claimant relied; and that said adverse claim was properly rejected for the further reason that the said adverse claimant did not comply with rule 86 of said rules of the General Land Office, in that said adverse claimant did not file or offer to file in connection with their said adverse claim a plat made from an actual survey by a United States deputy surveyor, nor did the plat presented contain a certificate of any surveyor or an official certificate thereon of its correctness, or have attached to said plat of survey a certificate and sworn statement by said surveyor, or any surveyor, as to the approximate value of the labor performed or improvements made on the claim by the adverse party or its predecessors in interest, or indicate thereon the position of any shafts, tunnels, or other improvements existing upon the claim of the party opposing the application, showing by which party said improvements were made; while on the other hand the plaintiffs will contend at the trial of this cause that it was not necessary for them in complying with the provisions of section 2326 of the Revised Statutes of the United States to regard the said rules of
19 the General Land Office of the United States requiring that they file with their adverse claim certified copies of their location notices or that they should file with said adverse claim a plat made by a United States mineral surveyor from an actual survey made upon the ground, containing an official certificate by such surveyor as to its correctness, or that it was necessary that said plat should contain a certificate or sworn statement by the surveyor as to the approximate value of the labor performed and improvements made upon the claim by the adverse party or their predecessors in interest, or that said plat should indicate the position of any shafts, tunnels, or other improvements, if any such exist upon the claim of the party opposing the application, or show by which party said improvements were made.

That upon the determination of these questions by the court will depend the right of the plaintiffs to maintain this action.

The defendant alleges that no adverse claim has been filed and allowed against the application for patent made by the defendant for the Mountain View Lode mining claim, and that therefore no suit can be maintained in any court under the provisions of section 2326 of the Revised Statutes of the United States, or under the provisions of any law in support of the said pretended adverse claim of the plaintiffs, and that the said court has no jurisdiction to determine the question of the right of possession of said mining claim, an adjudication of which said title is prayed for in said complaint.

For a second cause of removal your petitioner alleges that
20 this is an action brought under the provisions of section 2326 of the Revised Statutes of the United States, in support of the adverse claim filed in the United States land office in the city of Spokane, State of Washington, by the plaintiffs against the application of the defendant for a patent upon the Mountain View Lode mining claim, situated in Stevens county, in the State of Washington, and involves the right of the defendant to receive a patent from the United States for said mining claim, pursuant to the laws of the United States governing the patenting of mining claims.

And for a further and separate ground of removal from the State court aforesaid to the United States circuit court for the district of Washington, eastern division, your petitioner alleges that this is a controversy arising under the laws of the United States and is a suit brought in support of an adverse claim filed by the plaintiffs in the United States land office at Spokane, in the State of Washington, against the application of the defendant for a United States patent for the Mountain View mining lode claim, situated in the county of Stevens and State of Washington.

That the defendant, the applicant for patent, claims to be the owner of the mining claim applied for by virtue of the location of said mining claim made by the applicant's grantor on the 9th day of October, 1895. And the plaintiffs claim to be the owners of the land and premises included within the Mountain View mining lode claim, the property of the defendant as applied for by virtue of the location thereof on the 20th day of February, 1896, by said plaintiffs and their grantors.

21 At the trial of the cause, plaintiffs will claim that the location made by the defendant's grantor on the said 9th day of October, 1895, was invalid and void for the reason that the location was made upon a portion of the public domain of the United States included within the Colville Indian reservation and not open to the location of mining claims; that the said Colville Indian reservation was created by executive order of the President of the United States on the — day of August, 1872, declaring all of that part of said Stevens county in the State of Washington, lying to the north and west of the Columbia river, to the east of the Okanagan river and south of the international boundary line between the United States and British Columbia, to be and constitute the Colville Indian reservation; and plaintiff will maintain upon the trial

that the lands so proclaimed by executive order as aforesaid were a part of the Colville Indian reservation at the time of the location of the said Mountain View Lode claim by defendant's grantor, and that therefore any location made by defendant's grantor on the 9th day of October, 1895, was void.

The defendant will contend and maintain at the trial of this cause that, by virtue of the act of Congress of July 1st, 1892, entitled "An act to provide for the opening of a part of the Colville reservation in the State of Washington, and for other purposes," the said land and premises upon which said Mountain View Lode claim was located became open and subject to the location of mining claims, and that by reason of the said act of Congress of July 1st, 1892, defendant's grantor, who was a citizen of the United
22 States over the age of twenty-one years and a qualified locator of a mining claim, had a right to locate said Mountain View Lode mining claim, and that the right of the plaintiffs or defendant in this action to recover at the trial thereof will depend upon the interpretation placed upon said act of Congress of July 1st, 1892, by this court.

Therefore your petitioner desires to remove this suit before the trial thereof into the next circuit court of the United States, to be held in the district of Washington, in the eastern division.

And your petitioner offers herewith good and sufficient surety for entering into said circuit court of the United States for the district of Washington, eastern division, on the first day of its next session, a copy of the record in this suit and for paying all costs that may be awarded by the said circuit court of the United States, if said court shall hold that said suit was wrongfully and improperly removed thereto.

And your petitioner therefore prays that said surety and said bond may be accepted, and that this suit may be removed into the next circuit court of the United States, to be held in the district of Washington, eastern division, pursuant to the statutes of the United States in such cases made and provided, and that no further proceedings be had herein in this court, and he will ever pray, etc.

MOUNTAIN VIEW MINING AND MILLING COMPANY,
By J. R. TAYLOR, *President, Petitioner.*
W. B. HEYBURN,
Attorney for Petitioner and of Counsel.

23 STATE OF WASHINGTON, } ss:
County of Spokane, }

J. R. Taylor makes oath and says that he is the president of The Mountain View Mining & Milling Company, the defendant in the above-named action, and the petitioner herein; that the foregoing petition is true of his own knowledge, except as to matters therein stated to be alleged on information and belief, and as to those matters he believes them to be true.

J. R. TAYLOR.

Subscribed and sworn to before me this 2nd day of January, 1897.

J. W. BINKLEY,
Notary Public in and for the State of Washington,
[SEAL.] *Residing at Spokane, in Spokane County.*

(Endorsed:) No. 739. In the superior court of the State of Washington in and for the county of Stevens. W. D. McFadden *et al.*, plaintiff-, *vs.* The Mountain View Mining & Milling Company, defendant. Original petition for removal to U. S. circuit court for district of Washington, eastern division. W. B. Heyburn, attorney for defendant. Filed in superior court, Stevens county, Washington, Jan. 4, 1897. L. F. Ledgerwood. J. B. T., county clerk. Filed Jan. 13, 1897. In the United States circuit court. A. Reeves Ayres, clerk, by James O'Neill, deputy.

24 In the Superior Court of the State of Washington in and for the County of Stevens.

W. D. McFADDEN, DAVID O'NEIL, CHAS. W. VEDDER, and W. E. Harris, Plaintiffs,
vs.
THE MOUNTAIN VIEW MINING & MILLING COMPANY (a Corporation), Defendant.

Bond for Costs on Removal of Cause.

Bond for costs in the matter of the removal of the above-entitled cause to the circuit court of the United States in and for the district of Washington, eastern division.

Know all men by these presents, that The Mountain View Mining and Milling Company, as principal, and Sam. E. Rigg and A. W. Doland, both of Spokane, Washington, as sureties, are held and firmly bound unto W. D. McFadden, David O'Neil, Chas. W. Vedder, and W. E. Harris in the penal sum of two thousand dollars, for the payment whereof well and truly to be made unto the said W. D. McFadden, David O'Neil, Chas. W. Vedder, and W. E. Harris, their heirs and assigns, we bind ourselves, our heirs, representatives and assigns, jointly and severally, firmly by these presents.

Yet upon these conditions: The said Mountain View Mining & Milling Company having petitioned the superior court of Stevens county, in the State of Washington, for the removal of a certain cause therein pending, wherein W. D. McFadden, David
25 O'Neil and Chas. W. Vedder and W. E. Harris are plaintiffs and The Mountain View Mining & Milling Company is defendant, to the circuit court of the United States for the district of Washington, eastern division, now, if the said Mountain View Mining & Milling Company, your petitioner, shall enter in the said court of the United States, on the first day of its next session, a copy of the record in said suit, and shall well and truly pay all costs that

may be awarded by said circuit court of the United States if said court shall hold that said suit was wrongfully and improperly removed thereto, then this obligation to be void; otherwise in full force and virtue.

Witness our hands and seals this 2d day of January, 1897.

MOUNTAIN VIEW MINING & MILLING COMPANY,
By J. R. TAYLOR, *President.* [L. S.]
SAM. E. RIGG. [L. S.]
A. W. DOLAND. [L. S.]

[SEAL.]

STATE OF WASHINGTON, } ss:
County of Spokane, }

Sam. E. Rigg and A. W. Doland, being duly sworn, each for himself, deposes and says: I reside in the city of Spokane, county of Spokane, and State of Washington, and am a freeholder therein; and am worth the sum of two thousand dollars over and above all property exempt from sale on execution.

SAM. E. RIGG.
A. W. DOLAND.

26 Sworn to before me this 2nd day of January, 1897.

J. R. TAYLOR,
Notary Public in and for the State of Washington,
[SEAL.] *Residing in Spokane.*

On this 2nd day of January, 1897, in the city and county of Spokane, Washington, before me, a notary public in and for the State of Washington, personally appeared the above-named Sam. E. Rigg and A. W. Doland, both of whom are to me known, and known to me to be the individuals described in, and who executed, the foregoing instrument, and then and there each of them severally acknowledged that he had executed the foregoing bond.

J. R. TAYLOR,
Notary Public in and for the State of Washington,
[SEAL.] *Residing at Spokane.*

Approved by—
JESSE ARTHUR, *Judge.*

(Endorsed:) No. 739. In the superior court of the State of Washington in and for the county of Stevens. W. D. McFadden *et al.*, plaintiffs, *vs.* The Mountain View Mining & Milling Company, defendant. Original bond on petition for removal to United States circuit court for district of Washington, eastern division. Filed in the superior court, Stevens county, Washington. W. B. Heyburn, attorney for defendant. Filed in superior court, Stevens
27 county, Washington, Jan. 4, 1897. L. F. Ledgerwood, J. B. T., county clerk. Filed Jan. 13, 1897, in the United States circuit court. A. Reeves Ayres, clerk, by James O'Neill, deputy.

In the Superior Court of the State of Washington in and for the County of Stevens.

W. D. McFADDEN, DAVID O'NEIL, CHAS. W. VEDDER, and W. E. Harris, Plaintiffs,
vs.
THE MOUNTAIN VIEW MINING & MILLING COMPANY (a Corporation), Defendant.

Order of Approval of Bond for Removal.

The defendant herein, having, within the time provided by law, filed its petition for removal of this cause to the circuit court of the United States for the district of Washington, eastern division, and it appearing, by said petition and from the complaint herein filed, that the defendant is entitled to a removal of this cause to the said circuit court of the United States for the district of Washington, eastern division; and it further appearing to the court that defendant has offered its bond in the sum of two thousand dollars, with Sam. E. Riggs and A. W. Doland as sureties thereon, and it appearing that said surety is good and sufficient,

28 Now therefore this court does hereby accept said bond and the same is ordered approved.

JESSE ARTHUR, *Judge.*

(Endorsed:) 739. Jour., pg. 250. In the superior court of the State of Washington for the county of Stevens. W. D. McFadden *et al.*, plaintiffs, *vs.* The Mountain View Mining & Milling Company. Order approv-ng bond for removal. Filed in superior court, Stevens county, Washington, Jan. 4, 1897. L. F. Ledgerwood, county clerk. —— ——, deputy. W. B. Heyburn, attorney for defendant, 309 Hyde block, Spokane, Washington. Filed Jan. 13, 1897, in the United States circuit court. A. Reeves Ayres, clerk, by James O'Neill, deputy.

And afterward, to wit, on the 14th day of January, 1897, there was duly filed in said court in said cause an answer and plea of defendant, in the words and figures following, to wit:

29 In the Circuit Court of the United States in and for the District of Washington, Eastern Division. In Equity.

W. D. McFadden, David O'Neil, Chas. W. Vedder, and W. E. Harris, Plaintiffs,
vs.
The Mountain View Mining & Milling Company (a Corporation), Defendant.

Answer to Bill of Complaint.

Answer of The Mountain View Mining & Milling Company, the defendant above named, to the bill of complaint of W. D. McFadden, David O'Neil, Charles V. Vedder, and W. E. Harris, the above-named plaintiffs.

In answer to said bill, except paragraph eight thereof, to which the defendant has filed its plea, The Mountain View Mining & Milling Company, the defendant, says as follows:

I.

That as to whether or not the plaintiffs, or each or any of them, are now, or at all times mentioned in the complaint, or at all, have been citizens of the United States, this defendant has not sufficient information upon which to base a belief, and therefore denies the same.

II.

Defendant admits that the said Mountain View Mining & Milling Company is now, and at all times mentioned in the said bill
30 of complaint was, a corporation organized and existing under the laws of the State of Washington, having its principal place of business in the city and county of Spokane, in the State of Washington.

III.

Defendant denies that the plaintiffs are now, or ever were, the owners of, or entitled to the possession of, the mining ground and premises claimed by them in the third paragraph of their said bill of complaint as the Columbia Lode mining claim or as the Grey Eagle Lode mining claim, being fifteen hundred feet along the length of the lode, or any other number of feet along the length of said lode, three hundred feet in width, or any other number of feet in width, on each side of the center of the vein or lode at the surface, throughout the length of the said claim. That as to whether or not on the 20th day of February, 1896, W. D. McFadden, David O'Neil, W. E. Harris and O. E. Cox, or any of them, were citizens of the United States the defendant has not sufficient information upon which to base a belief, and therefore denies the same.

Denies that on the said 20th day of February, 1896, the premises claimed by the said plaintiffs, sometimes as the Columbia and sometimes as the Grey Eagle Lode claim, were a part of the public do-

main open to the location of mineral claim, or vacant or unoccupied or unclaimed; or that the said W. D. McFadden, David O'Neil, W. E. Harris and O. E. Cox, or any of them, on the said 20th day of February, 1896, or at any other time, located a mineral claim thereon called by them the Columbia Lode claim, claiming fifteen hundred feet in length along the said lode and three hun-
31 dred feet in width on each side of the center of said claim or lode at the surface throughout the length of said claim, or that said alleged locators thereupon, or at all, posted a notice of location upon said claim at the point of discovery of said claim describing the same, or marked the said location upon the ground so that the boundaries thereof could be readily traced. Defendant admits that the said alleged locators did on the 20th day of February, 1896, file and cause to be recorded, in the office of the county auditor of said Stevens county, a pretended notice of location of the said pretended Columbia Lode claim, but denies that the said location notice in all respects complied with the laws of the United States or of the State of Washington. Denies that the said pretended location was within the limits of any established mining district, or that there were any local rules or customs of miners governing the location of any mining claim at the point where the said pretended location is claimed to have been made.

That as to whether or not the plaintiff C. W. Vedder has succeeded by purchase or regular conveyance, or at all, to all of the right, title or interest of the said locator O. E. Cox in and to the said Columbia Lode mining claim the defendant has not sufficient information upon which to base a belief, and therefore denies the same.

Defendant denies that the said plaintiffs or any of them have at all times or at any time since the alleged location of the said Columbia Lode mining claim complied with the laws of the United States or of the said State of Washington, or with any local rules or customs of the miners of said district, governing the said district for the
32 holding and working of mining claims upon the public lands of the United States. Denies that by virtue of said alleged discovery, or any discovery, or the location, recording or working of the said alleged mining claim, or a compliance with the laws of the United States, or with the laws of the said State of Washington, or of any local rules or customs of miners of any mining district, or of the alleged conveyance by the said O. E. Cox to the plaintiff C. W. Vedder, that the plaintiffs, or any of them, are now the owners of the said alleged mining claim, or any part thereof, or entitled to the exclusive right of possession thereof as against all persons or this defendant.

IV.

Defendant denies that the plaintiffs, or any of them, are the owners, or entitled to the right of possession, of that certain other lode mining claim known as and called the Kruger Lode mining claim, as described in the fourth paragraph of the plaintiffs' complaint, or that the said plaintiffs, or any of them, are the owners, or entitled to the possession, of the land and premises included within the said

pretended lode claim called the Kruger, either under the name of the Kruger or the Exchequer Lode mining claim, or any other name whatever. That as to whether or not on the 20th day of February, 1896, the plaintiffs W. D. McFadden, David O'Neil, W. E. Harris and one O. E. Cox were citizens of the United States over the age of twenty-one years, this defendant has no information or belief, and therefore denies the same.

33 Denies that on said 20th day of February, 1896, or at any other time, the said alleged locators entered upon the said premises described as the Kruger Lode claim, the same being then and there a part of the vacant and unoccupied public lands of the United States, open to location and exploration as mineral claims, and denies that the said lands and premises were on the 20th day of February, 1896, or at any time after the 16th day of October, 1895, a part of the vacant and unoccupied public mineral lands of the United States, open to exploration and location as a mineral claim. Denies that said alleged locators discovered thereon any vein or ledge of rock in place, bearing gold and silver or other precious metals, or that the said alleged locators then and there, or at all, located thereon a mineral claim, claiming fifteen hundred feet in length along the said alleged lode, and three hundred feet in width on each side of the center of said vein at the surface, throughout the length of said vein, or then and there posted at the point of discovery on said claim, or at any point on said claim, or then and there marked said location on the ground so that the boundaries thereof could be readily traced. Defendant admits that on the 20th day of February, 1896, the said alleged locators filed or caused to be filed and recorded, in the office of the county auditor of the said county of Stevens, a pretended notice of location, of the pretended lode claim called the Kruger, but denies that the said pretended locators fully complied or complied at all with the laws of the United States or of the State of Washington, or with any local rules or customs of miners of any mining district in which the said claim is located governing the location of mining claims.

34 V.

That as to whether or not the plaintiff C. W. Vedder has by purchase or regular conveyance succeeded to all the right or title in the premises of the said O. E. Cox, in and to the said Kruger Lode claim, the defendant has no information upon which to base a belief, and therefore denies the same.

Defendant denies that the plaintiffs, including the said C. W. Vedder and his grantor, the said O. E. Cox, or any of them, have at all times, or at any time since the alleged location of said alleged Kruger Lode mining claim, fully complied with or complied at all with the laws of the United States or of the State of Washington, or with any local rules and regulations of miners in any mining district, governing the location, recording and working of said alleged mineral claim necessary to hold the same, or that plaintiffs are now the lawful owners and holders of the said Kruger Lode claim or of the whole thereof, or any part thereof, or that the plaintiffs are en-

titled to the exclusive right of possession thereof or any right of possession thereof, as against all persons, or as against this defendant.

This defendant admits that on the 20th day of February, 1896, the plaintiffs, or some persons under whom they claim, pretending and claiming that the location of the Mountain View Lode mining claim made by the defendant's grantor as hereinafter set forth was void and illegal for the reason that at the time when said Mountain View mining claim was located as hereinafter set forth, the land and premises included in said location was not open to the
35 location of mining claims for the reason that the same was within the limits and boundaries of the Colville reservation as set aside by executive order of the President of the United States on August 9th, 1872, and further claiming and pretending that the act of Congress of July 1st, 1892, entitled "An act to provide for the opening of a part of the Colville reservation in the State of Washington, and for other purposes," did not open that portion of the said reservation by said act declared to be restored to the public domain, to the location of mining claims under the laws of the United States regulating the location of mining claims, and further contending and maintaining that the said land and premises located as the Mountain View mining claim by the defendant's grantor which is situated within that portion of the said Colville Indian reservation declared by said act of July 1st, 1892, to be restored to public domain, did not become open and subject to the location mining claims until after the passage of the act of Congress of February 20th, 1896, especially declaring the said portion of the said Indian reservation subject to the operation of the mining laws of the United States, during the temporary absence of the defendant's grantor entered into and upon the said Mountain View mining claim and pretended to locate a mining claim called the Kruger, and another mining claim called the Columbia, and another mining claim called the Exchequer, and another mining claim called the Grey Eagle, overlapping and conflicting with the said Mountain View Lode mining claim, but defendant alleges and contends that said locations of the Kruger, Columbia, Exchequer and
36 Grey Eagle Lode claims, by the plaintiffs and their grantors, were illegal and void, for the reason that the land and premises attempted to be located by said locations were not a part of the public mineral lands of the United States, open to exploration and purchase, at the time of the alleged location of said claims by plaintiffs and their grantors, by reason of the fact that the said premises had already been located and claimed by the valid location of the Mountain View Lode mining claim, so made by defendant's grantor, Charles N. Collins, as hereinafter set forth.

Defendant admits that heretofore, on the 22nd day of September, 1896, the Mountain View Mining & Milling Company made, or caused to be made, an official survey of the Mountain View mining claim for patent, said survey being United States official survey No. 351, but denies that the said survey was without right, or that it overlapped or included or took in any portion of the said alleged

Columbia Lode mining claim, the alleged property of the plaintiffs as set forth in said sixth paragraph of plaintiffs' bill of complaint, or at all.

VII.

Defendant admits that on the 22nd day of September, 1896, it filed in the United States land office at the city of Spokane in the State of Washington an application for a patent for the said Mountain View mining claim, survey No. 351, together with the plat and field-notes of the said Mountain View claim made by and under the direction of a United States deputy mineral surveyor, acting under the order of survey issued by the United States surveyor general for
37 the State of Washington, showing the boundaries of the said Mountain View mining claim; and that it also caused to be posted a copy of the said plat, together with a notice of its application for patent, in a conspicuous place on the land embraced in said plat, and also filed in said land office an affidavit of two persons that said notice was duly posted upon said premises, and filed in said land office a copy of said notice, and that thereafter, on the 1st day of October, 1896, the register of said land office published in the "Northport News," a weekly newspaper published nearest said claim, that said application for patent had been made, said notice being first published on the 1st day of October, 1896, and that said notice was published in said newspaper, once in each week for ten consecutive weeks thereafter.

Defendant denies that on or about the 1st day of July, 1896, or at any other time, while the plaintiffs W. D. McFadden, David O'Neil, W. E. Harris, and O. E. Cox, the alleged grantor of C. W. Vedder, or any of them were the owners of, or in the quiet and exclusive possession of, or entitled to the right of possession of, the said alleged Columbia or Kruger Lode mining claims, or that said defendant wrongfully or at all, without right, entered into or upon the said premises described in the complaint as the said Columbia and Kruger Lode mining claims, or any part thereof, and ousted or ejected the plaintiffs and the said E. O. Cox, or any of them therefrom, or that the defendant wrongfully and without right withholds the possession thereof from the plaintiffs.

Denies that the said plaintiffs or the said O. E. Cox, or any
38 of them, ever were the owners of, or in the quiet or exclusive possession of, or in the possession at all, or entitled to the right of possession, of the said Columbia or Kruger Lode mining claims, or any part thereof.

Denies that the defendant The Mountain View Mining & Milling Company, ever wrongfully or without right entered into or upon the said premises or any part thereof, or ousted or ejected the plaintiffs or the said O. E. Cox therefrom. Or that the defendant has at all times or at any time or does now wrongfully or without right withhold the possession thereof from the plaintiffs.

X.

Denies that the said survey of the Mountain View mining claim by the defendant, or the prosecution of the said application for patent, were made without any right or constitute a cloud upon the title or any title of the said plaintiff's right to the possession of, in or to the said portions of the said alleged Columbia or Kruger Lode claims which greatly embarrasses or damages, or embarrasses or damages at all, any title of the plaintiffs in or to either of the said alleged Columbia or Kruger lodes, or any part thereof, which should by law or equity be removed.

And the defendant, The Mountain View Mining & Milling Company, further answering the complaint of plaintiffs herein in order to procure such an adjudication in this suit as will entitle said defendant to proceed with its application for patent of the United States Government, for said Mountain View Lode mining claim, alleges:

I.

That on the 16th day of October, 1895, the land and premises hereinafter claimed as the Mountain View Lode mining claim were vacant, unoccupied mineral lands of the United States, open to and subject to location as such under the provisions of the laws of the United States relating to the location of mining claims.

II.

That on the said 16th day of October, 1895, Charles N. Collins was a citizen of the United States over the age of twenty-one years and a duly qualified locator of a mining claim upon the public domain of the United States.

That on the said 16th day of October, 1895, the said Charles N. Collins went upon that part of the said public domain and public mineral lands of the United States situated in Stevens county in the State of Washington, on the west side of the Columbia river about three miles southwesterly from the town of Northport and about one mile back from said Columbia river and about four miles north from the Little Dalles on said river, and within that portion of the said Stevens county which was by executive order of the President of the United States, dated August 9th, 1872, set aside as the Colville Indian reservation, and within that portion of the said Colville Indian reservation which was declared restored to the public domain of the United States by an act of Congress of July 1st, 1892, entitled "An act to provide for the opening of a part of the Colville reservation in the State of Washington, and for other purposes;" and the said Charles N. Collins then and there made the discovery of a ledge of mineral bearing rock in place carrying silver, lead and other precious and valuable metals, and after making the said discovery the said Charles N. Collins then and there located a mining claim based upon said discovery and called said mining claim the Mountain View, which is the same mining claim

for which the defendant has applied for patent of the United States, and the title of which is involved in this suit.

That the said Collins, after making said discovery of a ledge upon the Mountain View Lode mining claim so as aforesaid, then and there posted a notice of location at the point of such discovery, describing the ground claimed in said location, the number of feet claimed along said ledge and on each side thereof, together with the name of the claim, the name of the locator and the date of the location; and then and there marked said location upon the ground so that its boundaries could be distinctly traced, by placing at each corner and at the center of each end line of said claim a substantial post more than four inches in diameter and more than four feet high, squared and marked to indicate the position of such post upon said claim.

That thereafter, on the 21st day of October, 1895, the said Collins filed for record in the office of the recorder of said Stevens county what was substantially a copy of the notice location so posted by him as aforesaid upon the Mountain View Lode claim.

That thereafter, to wit, on the 29th day of November, 1895, the said Collins did file in said auditor's office an amended notice of location of the said Mountain View mining claim, for the purpose of more particularly describing the said claim with reference
41 to natural objects and permanent monuments, for the identification of the same.

That on the — day of ——, 1895, said Charles N. Collins, by good and sufficient deed, made, executed and delivered, did convey the said Mountain View mining claim to J. R. Taylor; and on the — day of ——, 1890, the said J. R. Taylor, by good and sufficient deed, did convey the said Mountain View mining claim to The Mountain View Mining & Milling Company, defendant herein, and by virtue of the said location of the Mountain View mining claim by the said Collins as aforesaid, and the mesne conveyances as aforesaid, the defendant, The Mountain View Mining & Milling Company, is now, and through its grantors and predecessors in interest has been, the owner of and entitled to the possession of the said Mountain View mining lode claim, which said premises are more particularly described as follows, to wit:

Beginning at the corner No. 1, a pine tree five feet long, five inches square, set two feet in ground with mound of earth and stones, inscribed, 1-351; from which northwest corner section 18, township 39 north, range 40, E. W. M., bears south 28 degrees, 58 minutes east 7,519.86 feet; thence north 29 degrees 47 minutes 44 seconds east 1,469.90 feet to corner No. 2, a pine post six feet long, five inches square, set two feet in ground, with mound of earth and stones, inscribed 2-351, from which a prominent peak bears south 78 degrees east; thence north 65 degrees 45 minutes west 411 feet to corner No. 3, a pine post five feet long, four inches square, set eighteen inches in the ground, with mound of earth and
42 stones, and inscribed 3-351; thence south 37 degrees west, 1,500 feet to corner No. 4, a pine post four feet long, five inches square, set two feet in the ground with mound of earth and stones,

and inscribed 4-351; thence south 65 degrees 45 minutes east 600 feet to corner No. 1, place of beginning—being a survey of the exterior boundaries of the Mountain View mining claim. Magnetic variation 22 degrees, 52 minutes east. containing 16.977 acres.

And this defendant alleges that it has performed the requisite amount of labor provided to be performed upon said Mountain View mining claim under the laws of the United States to entitle it to receive a patent of the United States therefor, and has made its application for patent therefor in due form and done such acts in connection with said application for patent as entitle it to enter the land therein contained and receive said patent upon the determination of this suit in its favor by this honorable court.

Wherefore it, the said defendant, prays judgment of this court:

1. That the plaintiffs have no right to maintain this action.

2. That the plaintiffs have no right, title or interest in or to the said mining premises and ground in controversy, called and applied for as the Mountain View Lode mining claim.

3. That the defendant, The Mountain View Mining & Milling Company, be decreed to be the owner and entitled to the possession of the land and premises herein described as the Mountain View Lode mining claim, and to every part thereof.

43 4. That the defendant may have such other and further relief as to a court of equity may seem meet and proper in the premises.

5. And that the defendant may have its costs and disbursements herein.

THE MOUNTAIN VIEW MINING & MILLING COMPANY,

[SEAL.] By J. R. TAYLOR, *President.*

W. B. HEYBURN,

Of Counsel for Defendant.

STATE OF WASHINGTON, } ss:
County of Spokane, }

J. R. Taylor makes solemn oath and says: I am president of The Mountain View Mining & Milling Company, the defendant named in the above and within answer; that the seal affixed to the said answer is the corporate seal of the said company and was affixed thereto by authority of the said company; that I signed the said answer as president by like authority; that I have read the said answer and know the contents thereof, and that the matters therein stated as of my own knowledge are true, and, as to other matters therein stated upon the information of others, I believe to be true.

J. R. TAYLOR.

Subscribed and sworn to before me this 14th day of January, 1897.

J. W. BINKLEY,

[SEAL.] *Notary Public in and for the State of Washington, Residing at Spokane, in Spokane County, Washington.*

(Endorsed:) No. 511. In the circuit court of the United States in and for the district of Washington, eastern division. W. D. McFadden *et al.*, plaintiffs, *vs.* Mountain View Mining & Milling Co., defendants. In equity. Answer. Original. W. B. Heyburn, attorney for defendant. Filed Jan. 14, 1897. In the United States circuit court. A. Reeves Ayres, clerk, by James O'Neill, deputy.

In the United States Circuit Court in and for the District of Washington, Eastern Division. In Equity.

W. D. McFADDEN, DAVID O'NEIL, CHAS. W. VEDDER, and W. E. Harris, Plaintiffs,
vs.
THE MOUNTAIN VIEW MINING & MILLING COMPANY (a Corporation), Defendants.

Plea of Defendant.

The plea of The Mountain View Mining and Milling Company, the above-named defendant, to paragraph 8 of complaint of the above-named plaintiffs.

The defendant, The Mountain View Mining & Milling Company, by protestation, not confessing or acknowledging all or any of the matters and things in said bill of complaint mentioned to be true, in such manner and form as the same are therein set forth and alleged, does plead thereto, and for plea does say:

That as to such of the said parts of the said plaintiff's bill as *is* contained in paragraph eight thereof, that this suit is brought under the provisions of section 2326 of the Revised Statutes of the United States, in support of an adverse claim filed in the United States land office on the 28th day of November, 1896, by the plaintiffs against the application for patent to the Mountain View mining claim, made by the defendant in the United States land office at Spokane, Washington, under the provisions of section 2326 of the Revised Statutes of the United States, this defendant for plea thereto says:

That on September 22nd, 1896, the defendant, The Mountain View Mining & Milling Company, filed in the United States land office at Spokane, Washington, its application for patent for the Mountain View mining claim, situated in Stevens county, in the State of Washington. That notice of said application for patent was duly posted in said land office and advertised ten consecutive weeks. That on the 28th day of November, 1896, the plaintiffs presented to the United States land office a protest and map claiming that the said application conflicted with the Columbia or (and) with the Kruger Lode mining claim claimed by the plaintiffs. That said map and protest were offered as an adverse claim to the said application for patent. That said map was certified to by E. P. Harrison, surveyor, there being nothing to show on said map or in said certificate that the said Harrison was a deputy mineral sur-

veyor of the United States, at the time of making the said survey of the said claims; and the claimants also failed to offer with said map and protest a certified copy of the location notice of the Columbia or the Kruger Lode claims, whereupon the said ad-
46 verse claim, including the said map, were rejected by the said United States land office as insufficient to constitute an adverse claim under the laws of the United States relative to adverse claims, and the said United States land office refused to file the same.

That the allegation contained in the eighth paragraph of the plaintiff's bill of complaint, that on the 28th day of November, 1896, and within the sixty days' period of publication of the said notice of the application for patent the plaintiff duly filed with the register and receiver of the United States land office at the city of Spokane, in the State of Washington, their protest and adverse claim against the said application for patent to the Mountain View mining claim, which said protest and adverse claim set forth the nature, boundary and extent of their said adverse claims or claim as required by law, is untrue in fact.

That there is no adverse claim on file in the said United States land office against the application for patent of the defendant for the Mountain View mining claim, upon which to base this action.

W. B. HEYBURN,
Solicitor and of Counsel for the Defendant, The Mountain View Mining & Milling Company, No. 303 Hyde Block, Spokane, Washington.

I hereby certify that the foregoing plea is in my opinion well founded in point of law.

W. B. HEYBURN,
Of Counsel for Defendant.

Spokane, Wash., Jan. 13, 1896.

47 STATE OF WASHINGTON, } *ss:*
County of Spokane, }

J. R. Taylor being duly sworn, deposes and says: I am president of the Mountain View Mining & Milling Company, the above-named defendant. The foregoing plea is true in point of fact, and is not interposed for delay.

J. R. TAYLOR.

Attest:
[SEAL.] WM. AITCHISON, *Sec'y.*

Subscribed and sworn to before me this 13th day of January, 1897.

J. W. BINKLEY,
[SEAL.] *Notary Public in and for the State of Washington, Residing at Spokane, in Spokane County, Washington.*

(Endorsed:) No. 511. In the circuit court of the United States in and for the district of Washington, eastern division. W. D. McFad-

den *et al.*, plaintiffs, *vs.* Mountain View Mining & Milling Co., defendant. Plea of defendant. Original. W. B. Heyburn, attorney for defendant. Filed Jan. 14, 1897. In the United States circuit court. A. Reeves Ayres, clerk, by James O'Neill, deputy.

And afterwards, to wit, on the 15th day of January, 1897, there was duly filed in said court in said cause an affidavit of service in the words and figures following, to wit:

48 In the Circuit Court of the United States in and for the District of Washington, Eastern Division.

W. D. McFADDEN, DAVID O'NEIL, CHARLES W. VEDDER, and W. E. Harris, Plaintiffs,
vs.
THE MOUNTAIN VIEW MINING & MILLING COMPANY (a Corporation), Defendant.

Affidavit of Service of Defendant's Plea and Answer.

I, T. Harris Bartlett, being first sworn, say that I am a white male citizen of the United States and citizen of the State of Washington, over the age of twenty-one years, and reside at Spokane in said State; that on the 14th day of January, 1897, in behalf of W. B. Heyburn, Esq., of counsel for defendant in the above-entitled suit, I served upon Albert Allen, Esq., of counsel for plaintiffs in said suit, a copy of the defendant's plea and a copy of the defendant's answer filed in said suit in the above-entitled court on the 14th day of January, 1897, which said copies were properly and regularly certified to be such by the clerk of said court, by delivering them to Burton J. Onstine, Esq., an attorney-at-law over the age of twenty-one years, and who was on the said 14th day of January, in
49 the absence of the said Allen from his office at No. 310 Hyde block in the city of Spokane, State of Washington, in charge of said office, and who subsequently, to wit, on the 15th day of January, 1897, told me that the said Allen had received from him the said copies of said plea and said answer.

T. HARRIS BARNETT.

Subscribed and sworn to before me this 15th day of January, 1897.

[SEAL.] F. E. LANGFORD,
Notary Public in and for the State of Washington, Residing at Spokane, in Spokane County, Washington.

(Endorsed:) No. 511. In the circuit court of the United States in and for the district of Washington, eastern division. W. D. McFadden *et al.*, plaintiffs, *vs.* Mountain View Mining & Milling Co., defendant. Affidavit of service of plea and answer. W. B. Heyburn, attorney for defendant. Filed Jan. 15, 1897, in the United States circuit court. A. Reeves Ayres, clerk, by James O'Neill, deputy.

And afterward, to wit, on the 23rd day of January, 1897, there was duly filed in said court in said cause notice of filing papers on removal in the words and figures following, to wit:

50 In the Circuit Court of the United States in and for the District of Washington, Eastern Division.

W. D. McFADDEN, DAVID O'NEIL, CHARLES W. VEDDER, and W. E. Harris, Plaintiffs,
vs.
THE MOUNTAIN VIEW MINING & MILLING COMPANY (a Corporation), Defendant.

Notice.

To Albert Allen, Esq., and to W. T. Stoll, Esq., attorneys for the plaintiffs in the above-entitled action:

Please take notice that the following-named papers in the above-entitled action have been sent by the clerk of the superior court for Stevens county, State of Washington, to the clerk of the United States circuit court for the district of Washington, eastern division, and filed in said last-named court on the 13th day of January, 1897, to wit:

The original summons and complaint filed in said superior court for Stevens county; petition for removal of cause to the aforesaid United States circuit court; bond on petition for removal, and order approving said bond.

W. B. HEYBURN,
Attorney for Defendant.

51 Service of copy of this paper received this 23 day of January, 1897.

W. T. STOLL,
Attorney for —.

(Endorsed:) No. —. In the circuit court of the United States in and for the district of Washington, eastern division. W. D. McFadden *et al.*, plaintiffs, *vs.* Mountain View Mining & Milling Co., defendant. Notice of filing of papers on removal to above court. Original. W. B. Heyburn, attorney for defendant, No. 303 Hyde block, Spokane, Wash. Filed Jan. 23, 1897, in the United States circuit court. A. Reeves Ayres, clerk, by James O'Neill, deputy.

And afterward, to wit, on the 26th day of January, 1897, there was duly filed in said court in said cause demurrer to plea and motion to remand cause, in the words and figures following, to wit:

In the Circuit Court of the United States in and for the District of Washington, Eastern Division. In Equity.

W. D. McFADDEN, DAVID O'NEIL, CHARLES W. VEDDER, and W. E. Harris, Plaintiffs,
vs.
THE MOUNTAIN VIEW MINING & MILLING COMPANY (a Corporation), Defendant.

52 *Motion to Remand.*

Come now the plaintiffs and move the court to remand this cause to the superior court of Stevens county, State of Washington, for trial, for the reason that the same has been improperly removed to this court in this, to wit:

It does not appear from the pleadings or the record that this is a case arising under the Constitution or laws of the United States.

ALBERT ALLEN,
WM. T. STOLL,
Solicitors and of Counsel for Plaintiffs.

I, Wm. T. Stoll, one of the solicitors and of counsel for the plaintiffs in the above entitled cause, do hereby certify that the foregoing motion is, in my opinion, well founded in point of law.

WM. T. STOLL,
Solicitor and of Counsel for Plaintiffs.

(Endorsed:) No. 511. In the United States circuit court. W. D. McFadden *et al.*, plaintiff-, *vs.* Mountain View Mining & Milling Co., defendant. Due service of within paper (motion) by receipt of a true copy thereof admitted this 26 day of Jan., 1897. W. B. Heyburn, attorney for defendant. Filed Jan. 26, 1897. A. Reeves Ayres, clerk. James O'Neill, deputy.

53 In the Circuit Court of the United States in and for the District of Washington, Eastern Division. In Equity.

W. D. McFADDEN, DAVID O'NEIL, CHARLES W. VEDDER, and W. E. Harris, Plaintiffs,
vs.
THE MOUNTAIN VIEW MINING & MILLING COMPANY (a Corporation), Defendant.

Demurrer of Plaintiffs to Plea of Defendant.

These plaintiffs, not confessing all or any of the matters in the plea of the defendant to paragraph eight of the plaintiffs' bill of complaint, filed herein, to be true, as therein set forth, do demur to said plea for that the same does not state such a defense, nor contain any defensive matter, entitling the defendant to any relief thereon against these plaintiffs:

Wherefore, they pray the judgment of the court whether they shall be compelled to further answer said plea.

WM. T. STOLL,
ALBERT ALLEN,
Solicitors and of Counsel for Plaintiffs.

54 I, Wm. T. Stoll, one of the solicitors and of counsel for the plaintiffs above named, do hereby certify that in my opinion the foregoing demurrer is well founded in point of law.

WM. T. STOLL,
Solicitors and of Counsel for Plaintiffs.

(Endorsed:) No. 511. In the United States circuit court. W. D. McFadden *et al.*, plaintiff-, *vs.* Mountain View Mining & Milling Co., defendant. Due service of within paper (demurrer) by receipt of a true copy thereof admitted this 26 day of Jan., 1897. W. B. Heyburn, attorney for defendant. Filed Jan. 26, 1897. A. Reeves Ayres, clerk. James O'Neill. W. T. Stoll, Ziegler block, Spokane, Wash., attorneys for —.

And afterwards, to wit, on the 26th day of January, 1897, there was duly filed in said court in said cause a replication in the words and figures following, to wit:

55 In the Circuit Court of the United States in and for the District of Washington, Eastern Division. In Equity.

W. D. McFadden, David O'Neil, Charles W. Vedder, and W. E. Harris, Plaintiffs,
vs.
The Mountain View Mining & Milling Company (a Corporation), Defendant.

Replication to Answer.

Replication of plaintiff- in the above cause to the answer of the defendants.

These repliants saving and reserving all advantage and exceptions to the manifold insufficiencies of said answer, for replication thereto, say: that they will aver and prove their said plea to be true and sufficient and that the said answer is untrue and insufficient.

Wherefore they pray relief as in their bill of complaint.

WM. T. STOLL,
ALBERT ALLEN,
Solicitors and of Counsel for Plaintiffs.

State of Washington, } *ss:*
County of Spokane, }

56 Charles W. Vedder, being first duly sworn, makes oath and says: I am one of the plaintiffs named in the within replication; that I have read said replication and know the contents

thereof and that the matters therein stated are true of my own knowledge.

CHARLES W. VEDDER.

Subscribed and sworn to before me this 26th day of January, 1897.

S. P. DOMER,
Notary Public for Washington,
Residing at Spokane, Wash.

[SEAL.]

(Endorsed:) No. 511. In the United States circuit court. W. D. McFadden *et al.*, plaintiff, *vs.* Mountain View Mining & Milling Co., defendant. Due service of within paper (replication) by receipt of a true copy thereof admitted this 26th day of January, 1897. W. B. Heyburn, attorney for defendant. Filed Jan. 26, 1897. A. Reeves Ayres, clerk, by James O'Neill. W. T. Stoll, Ziegler block, Spokane, Wash., attorney for —.

And afterwards, to wit, on the 16th day of April, 1897, there was duly filed in said court in said cause, a supplemental answer, in the words and figures following, to wit:

57 In the Circuit Court of the United States in and for the District of Washington, Eastern Division. In Equity.

W. D. McFADDEN, DAVID O'NEIL, CHARLES W. VEDDER, and W. E. Harris, Plaintiffs,
vs.
THE MOUNTAIN VIEW MINING & MILLING COMPANY (a Corporation), Defendant.

Supplemental Answer to Bill of Complaint.

Supplemental answer of The Mountain View Mining and Milling Company, the defendant above named, to the bill of complaint of W. D. McFadden, David O'Neil, Charles W. Vedder, and W. E. Harris, the above-named plaintiffs.

By leave of court, first had and obtained, the defendant, further answering herein, answers the eighth paragraph of the plaintiff's complaint, and denies that on the 28th day of November, 1896, within the sixty days' period of publication of notice, or at any other time, the plaintiffs duly filed with the register and receiver of the land office at the city of Spokane, in the State of Washington, their protest and adverse claim against the application of the defendant for a patent to the Mountain View Lode mining claim.

Denies that any such protest and adverse claim was filed in the said land office which set forth the nature, boundaries and
58 extent of any adverse claim of the plaintiffs against the application for patent by defendant, as required by law.

Denies that this suit is brought in support of any valid adverse claim filed in said land office by the plaintiffs, or any of them,

against the application for patent made by the defendant, to determine the right of possession of any portion of the said alleged Columbia and Kruger Lode mining claims, alleged to be included within the survey and application for patent for the Mountain View Lode mining claim.

That defendant alleges the truth to be that about the 28th day of November, 1896, the plaintiffs presented, at the United States land office aforesaid, certain papers and plats purporting to be and constitute an adverse claim against the application of the defendant for a patent to the said Mountain View mining claim, but that the said adverse claim and plat did not conform to the legal requirements in the premises, and did not show the nature, boundaries and extent of the adverse claim as required by law, and said adverse claim so presented was rejected by the register and receiver of the United States land office, and filing thereof was refused. That there is not now on file in the said United States land office any protest and adverse claim against the issuance of a patent for the said Mountain View Lode mining claim, as applied for by the defendant.

That the action of the said register and receiver of the said land office has been affirmed by the Commissioner of the General Land Office upon appeal from their said action in refusing to file and allow the said adverse claim.

59 Wherefore defendant prays the judgment of this court, first, as in its original answer.

Second. That the plaintiffs have no right to maintain this action.

Third. That the defendant may have such other and further relief as to a court of equity may seem meet and proper in the premises.

Fourth. That the defendant may have its costs and disbursements herein.

MOUNTAIN VIEW MINING & MILLING COMPANY,
By J. R. TAYLOR, *President.*
W. B. HEYBURN,
Counsel for Defendant.

[SEAL.]

STATE OF WASHINGTON, } *ss:*
County of Spokane, }

J. R. Taylor makes solemn oath and says: I am president of The Mountain View Mining & Milling Company, the defendant named in the above and within supplemental answer; that the seal affixed to the said answer is the corporate seal of the said company and was affixed thereto by authority of the said company; that I signed the said answer as president by like authority; that I have read the said answer and know the contents thereof, and that the matters therein stated as of my own knowledge are true, and, as to other matters therein stated upon the information of others, I believe to be true.

J. R. TAYLOR.

60 Subscribed and sworn to before me this 14th day of April, 1897.

J. W. BINKLEY,

[SEAL.] *Notary Public in and for the State of Washington, Residing at City of Spokane, in Spokane County, Washington.*

(Endorsed:) No. —. In the circuit court of the United States in and for the district of Washington, eastern division. W. D. McFadden *et al.*, plaintiff-, *vs.* The Mountain View Mining & Milling Co., defendant. In equity. Supplemental answer. Filed April 16, 1897. Original. In the United States circuit court. A. Reeves Ayres, clerk, by James O'Neill, deputy. W. B. Heyburn, attorney for defendant, 303 Hyde block, Spokane, Wash. Service of a copy of within supplemental answer accepted this 16 day of April, 1897. W. T. Stoll and Albert Allen, solicitors for plaintiff.

And afterwards, to wit, on the 21st day of April, 1897, there was duly filed in said court in said cause, a motion to strike, in the words and figures following, to wit:

61 In the United States Circuit Court in and for the District of Washington, Eastern Division.

W. D. McFADDEN, DAVID O'NEIL, CHARLES W. VEDDER, and W. E. Harris, Plaintiffs,
vs.
THE MOUNTAIN VIEW MINING — MILLING COMPANY (a Corporation), Defendants.

Motion to Strike Out Plea.

Now come W. D. McFadden, David O'Neil, Charles W. Vedder and W. E. Harris, plaintiffs in the above-entitled action, by their attorneys W. T. Stoll and Albert Allen, and move the court to strike from the files of the court that certain paper filed by the defendant herein on the — day of ——, 1897, and styled the plea of defendant to paragraph eight of the complaint.

This motion is made on the following grounds, to wit:

1. Because this is an action at law and not an action in equity, and the plea is unauthorized.

2. This being an action at law the matter contained in said plea, if proper to be pleaded at all, should be set up in the answer.

62 3. The defendant, having answered the complaint, has waived its right to file or retain a plea to a portion of the complaint.

4. It is incompetent for the defendant to enter a plea to one paragraph of the complaint while answering as to other parts of the complaint.

5. Under the rules of this court matter in abatement must be pleaded in a separate plea or answer in the nature of a plea in

abatement, to which plaintiff may reply or demur, and the issues arising thereon shall be tried before any other defense or counterclaim is pleaded, and the defendant having answered herein its right to such plea is waived.

W. T. STOLL,
ALBERT ALLEN,
Attorneys for Plaintiffs.

(Endorsed:) No. —. In the superior court of Spokane county, Washington. W. D. McFadden *et al.*, plaintiff-, *vs.* The Mountain View Mining & Milling Company, defendant. Motion. Due service of within motion by receipt of a true copy thereof admitted this 21 day of April, 1897. W. B. Heyburn, attorney for defendant. Filed April 21, 1897. A. Reeves Ayres, clerk, by James O'Neill.

And afterwards, to wit, on Wednesday, the twenty-first day of April, 1897, the same being the fourteenth judicial day of
63 the regular April term of said court—present, the Honorable Cornelius H. Hanford, United States district judge, presiding—the following proceedings were had in said cause, to wit:

In the United Sates Circuit Court in and for the District of Washington, Eastern Division.

W. D. McFadden, David O'Neil, Charles W. Vedder, and W. E. Harris, Plaintiffs,
vs.
The Mountain View Mining & Milling Company (a Corporation), Defendant.

Order Striking Pleas from File.

The parties to this action having treated the same as a suit in equity, the defendant having filed its answer in equity, together with an equitable plea, and the plaintiffs having moved the court to strike such plea from the files of this court because it is an action at law and the plea therefore unauthorized:

It is now at this time ordered by the court that the plaintiffs' said motion be and the same is hereby granted, and said plea is hereby stricken from the files of this court, because the same
64 is improperly filed herein on account of this being a law case. The defendant excepts and exception allowed.

Done in open court this 21st day of April, 1897.

C. H. HANFORD, *Judge.*

(Endorsed:) No. —. In the U. S. circuit court, district of Washington. W. D. McFadden *et al.*, plaintiff-, *vs.* The Mountain View Mining & Milling Co., defendant. Order. Due service of within — by receipt of a true copy thereof admitted this — day of ——. —— ——, attorney for —. Ent. Law Bk., page 296. Filed April 21, 1897. A. Reeves Ayres, clerk, by James O'Neill.

And afterward, to wit, on the twenty-second day of April, 1897, there was duly filed in said court in said cause, a reply in the words and figures following, to wit:

65 In the United States Circuit Court in and for the District of Washington, Eastern Division.

W. D. McFADDEN, DAVID O'NEIL, CHARLES W. VEDDER, and W. E. Harris, Plaintiffs,
vs.
THE MOUNTAIN VIEW MINING & MILLING COMPANY (a Corporation), Defendants.

Amended Reply to Answer.

Now come plaintiffs in the above-entitled action, by leave of the court first had and obtained for an amended reply to the answer, and say:

I.

To the allegations contained in the third paragraph of subdivision five of defendant's answer, admit that the land and premises now claimed by the defendant as the Mountain View mining claim was within and a part of the Colville Indian reservation at the time of the pretended location thereof by the defendant's grantor, Charles N. Collins, and admit that the plaintiffs W. D. McFadden, David O'Neil, W. E. Harris and one O. E. Cox, grantor of the plaintiff Charles W. Vedder, located the mining claims called the
66 Kruger and Columbia mining claims, on the twentieth day of February, 1896, but deny each and every other affirmative allegation in said third paragraph of said subdivision five of said answer.

II.

They deny each and every allegation, matter, statement, and thing contained in the first paragraph of the defendant's further and affirmative answer.

III.

As to whether Charles N. Collins, the defendant's pretended grantor, was on the sixteenth day of October, 1895, or at any other time, a citizen of the United States, over the age of twenty-one years, or otherwise qualified to locate mining claims upon the public domain of the United States, these plaintiffs deny that they have any knowledge or information thereof sufficient to form a belief; and they deny each and every other allegation, matter, statement, or thing contained in subdivision two of the defendant's further and affirmative answer, except that the lands and premises described in said subdivision two are, and were, at the time of the alleged location thereof by the defendant'- grantor, within the limits of the Colville Indian reservation.

And for reply to the affirmative matter contained in the supplemental answer of the defendant herein, plaintiffs admit:

I.

That on the twenty-eighth day of November, 1896, the plaintiffs presented at the United States land office in Spokane, Wash-
67 ington, papers and plats purporting to be and constituting an adverse claim against the application for a patent by the defendant for the so-called Mountain View mining claim, but deny each and every other allegation, matter, statement, and thing therein contained.

Wherefore, plaintiffs pray as they have heretofore in their complaint prayed.

WM. T. STOLL,
ALBERT ALLEN,
Attorneys for Plaintiffs.

STATE OF WASHINGTON, } ss:
County of Spokane, }

Dave O'Neil, being first duly sworn, on oath states: That he is one of the plaintiffs in the above-entitled cause; that he has heard read the foregoing reply; knows the contents thereof; and that the same is true, as he verily believes.

(X) DAVE O'NEIL.

Subscribed and sworn to before me this twenty-first day of April, 1897.

I. W. BENNETT,
Notary Public in and for the State of Washington,
[SEAL.] *Residing at the City of Spokane, Wash.*

(Endorsed:) No. 511. In the United States circuit court, district of Washington. W. D. McFadden *et al.*, plaintiff-, *vs.* The Mountain View Mining & Milling Co., defendant. Reply. Service of
68 within reply by receipt of a true copy thereof admitted this twenty-second day of April. W. B. Heyburn, attorney for defendant. Filed April 22, 1897. A. Reeves Ayres, clerk. Wm. T. Stoll and Albert Allen, the Rookery, Spokane, Wash., attorneys for plaintiffs.

And afterward, to wit, on the twenty-second day of April, 1897, there was duly filed in said court in said cause, a bill of exceptions, in the words and figures following, to wit:

In the Circuit Court of the United States in and for the District of Washington, Eastern Division.

W. D. McFADDEN, DAVID O'NEIL, CHARLES W. VEDDER, and W. E. Harris, Plaintiffs,
vs.
THE MOUNTAIN VIEW MINING & MILLING COMPANY, Defendant.

Bill of Exceptions.

Be it known that on the twenty-first day of April, 1897, the plaintiffs' motion, in the above-entitled cause, to strike from the files of the court the defendant's plea to paragraph eight of
69 the complaint, came on to be heard and the court granted said motion and ordered said plea stricken from the files, to which the defendant then and there excepted, which exception was duly allowed by the court, and this the defendant's bill of exceptions settled and sealed.

C. H. HANFORD, *Judge.*

(Endorsed:) No. —. In the circuit court of the United States in and for the district of Washington, eastern division. W. D. McFadden *et al.*, plaintiffs, *vs.* The Mountain View Mining Co., defendant. Bill of exceptions. Filed May 3, 1897. A. Reeves Ayres, clerk, by James O'Neill, deputy. W. B. Heyburn, attorney for defendant, 303 Hyde block, Spokane, Wash. Ent. L. R. B., page 298.

And afterward, to wit, on the seventeenth day of September, 1897, there was duly filed in said court in said cause, a stipulation of facts and exhibits, in the words and figures following, to wit:

70 In the Circuit Court of the United States in and for the District of Washington, Eastern Division.

W. D. McFADDEN, DAVID O'NEIL, CHARLES W. VEDDER, and W. E. Harris, Plaintiffs,
vs.
THE MOUNTAIN VIEW MINING & MILLING COMPANY (a Corporation), Defendant.

Stipulation as to Facts.

Come now the plaintiffs and defendant, and expressly waiving a jury herein, hereby stipulate that the following shall be and are the agreed facts in this cause, and that the same shall be taken for all purposes as the findings of fact of the court herein:

1st. That the plaintiffs, O. E. Cox, the grantor of the plaintiff Charles W. Vedder, and Charles N. Collins, the grantor of the defendant, were at all times mentioned in the pleadings and now are citizens of the United States over the age of twenty-one years.

2nd. That the defendant now is and at all times mentioned in

the pleadings herein has been a corporation duly organized, created and existing under and by virtue of the laws of the State of Washington.

71 3rd. That on the sixteenth day of October, 1895, one Charles N. Collins went upon the premises in the north half of the Colville Indian reservation, in the county of Stevens and State of Washington, claiming the same to be public lands of the United States, situated on the west side of the Columbia river about three miles southwesterly from the town of Northport and about one mile back from said Columbia river and about four miles north from the Little Dalles on said river; and the said Collins then and there made a discovery of a ledge of mineral-bearing rock in place carrying silver, lead and other precious and valuable metals, and after making the said discovery the said Collins then and there pretended to locate a mining claim based upon said discovery, and called said mining claim the Mountain View, which is the same mining claim described in the answer of the defendant herein, and which is correctly delineated upon and described in the map h reto attached, marked Exhibit "A" and made a part hereof; and which is the same mining claim for which the defendant has applied for patent from the United States, and the title of which is involved in this suit. That the said Collins after making said discovery of a ledge upon the Mountain View Lode mining claim so as aforesaid then and there posted a notice of location at the point of such discovery, describing the ground claimed in said location, the number of feet claimed along said ledge and on each side thereof, together with the name of the claim, the name of the locator and the date of the location; and then and there marked said location

72 upon the ground so that its boundaries could be distinctly traced, by placing at each corner and at the center of each end line of said claim a substantial post more than four inches in diameter and more than four feet high, squared and marked to indicate the position of such post upon said claim. That thereafter, and on the twenty-first day of October, 1895, the said Collins filed for record in the office of the recorder of said Stevens county what was substantially a copy of the notice of location so posted by him as aforesaid upon the Mountain View Lode claim. That thereafter, to wit, on the twenty-ninth day of November, 1895, the said Collins did file in said auditor's office an amended notice of location of the said Mountain View mining claim for the purpose of more particularly describing the said claim with reference to natural objects and permanent monuments, for the identification of the same. That defendant herein has succeeded by due and regular conveyance to whatever right, title and interest said Collins acquired under and by virtue of such location. That defendant has performed upon said claim the amount of labor required by the laws of the United States.

4th. That thereafter and on Feb. 20, 1896, the plaintiffs W. D. McFadden, David O'Neil, W. E. Harris and one O. E. Cox, the grantor in interest of the plaintiff Charles W. Vedder, entered upon the north half of the Colville Indian reservation, in the county of

Stevens and State of Washington, claiming the same to be public lands of the United States, and then and there discovered therein
a vein or lode of rock in place bearing gold, silver and other
73 precious metals, and then and there pretended to locate a
mineral claim thereon, called by them the Columbia Lode mining claim, claiming fifteen hundred feet in length along said lode so discovered, and three hundred feet in width on each side of the center of said vein or lode at the surface throughout the length of said claim, and which said claim is more particularly described as follows, to wit: that certain lode mining claim known as and called the Columbia Lode mining claim, situated on the north side of and about one and one-quarter miles from the Columbia river, and about two and one-half miles west of the town of Northport, in the county of Stevens, State of Washington, and being the same ground and premises sometimes called the Gray Eagle lode. That thereupon the said locators posted a notice of location upon said claim, at the point of discovery thereof, and described said location and marked said location upon the ground so that the boundaries thereof could be readily traced; that thereafter, on February 20, 1896, said locators duly filed and caused to be recorded in the office of the county auditor of said county of Stevens a notice of location of said Columbia Lode mining claim, containing the names of said locators, the date of location, and such a description of the claim so located, by reference to natural objects and permanent monuments, as to identify the same, and that said locators in all other respects complied with the laws of the United States and the laws of the State of Washington, and the local rules and customs of the miners of the district in which said claim was situated, governing the
location and manner of recording mineral claims. That the
74 plaintiff Charles W. Vedder has succeeded by regular conveyance to the right, title and interest of the said O. E. Cox in said claim, and that the plaintiffs are at this time invested with such title to said claim as said locators acquired by virtue of such location. That the plaintiffs have complied with the laws of the United States and of the State, and the local rules and customs of the miners of said district relative to the said district for holding and working of mining claims on the public lands of the United States.

5th. That on the said 20th day of February, 1897, the plaintiffs W. D. McFadden, David O'Neil, W. E. Harris and one O. E. Cox, the grantor in interest of plaintiff Charles W. Vedder, entered upon the north half of the Colville Indian reservation, in the county of Stevens, State of Washington, claiming the same to be public lands of the United States, and then and there discovered therein a vein or lode of rock in place bearing gold, silver and other precious metals, and then and there pretended to locate a mineral claim thereon called by them the Kruger Lode mining claim, claiming fifteen hundred feet in length along said vein or lode so discovered and three hundred feet in width on each side of the center of said vein at the surface throughout the length of said claim, and which said claim is more particularly described as follows, to wit: that

certain lode mining claim known as and called the Kruger Lode mining claim, situated on the north side of and about one and one-quarter miles from the Columbia river, and about two and one-half miles west of the town of Northport, in said county
75 of Stevens, State of Washington, and being east of and adjoining the Columbia Lode mining claim herein described, and being the same premises sometimes called the Exchequer Lode mining claim, said claim being fifteen hundred feet in length along the vein and three hundred feet in width on each side of the center of said vein throughout the length of said claim; and then and there posted at the point of discovery of said claim a notice of location thereof, describing said claim, and then and there marked said location on the ground so that the boundaries thereof could be readily traced; and thereafter and on Feb. 20, 1896, the said locators filed and recorded in the office of the county auditor in the said county of Stevens, a notice of location of said Kruger Lode mining claim, containing the names of said locators, the date of said location, and such a description of the claim so located, by reference to natural objects and permanent monuments, as would identify the said claim, and fully complied with the laws of the United States and the State of Washington, and the local rules and customs of the miners of the district in which said claim was located, governing the location of mining claims. That the plaintiff Vedder has succeeded by regular conveyance to the right, title and interest of said Cox in said claim, and that the plaintiffs are at this time invested with such title to said claim as said locators acquired by virtue of such location. That the plaintiffs have complied with the laws of the United States and of the State, and the local rules and customs of the miners of said district relative to holding and working mining claims on the public lands of the United States.
76 6th. That the map hereto attached, marked Exhibit "A," and made a part hereof, correctly shows the said several mining claims and the relation the same bear to each other, together with the areas in conflict.

7th. That on the — day of ——, 1896, the defendant caused the said Mountain View mining claim to be officially surveyed for patent, being United States official survey No. 351, and that the same as surveyed overlapped and included so much of the Columbia or Gray Eagle claim, claimed by plaintiffs, as is shown on the map hereto attached and marked Exhibit "A," and denominated and described thereon as "Area in conflict," and containing 8.79 acres; that said survey also overlapped and included so much of the Kruger or Exchequer mining claim and claimed by plaintiffs as is shown on said map, denominated and described thereon as "Area in conflict" and containing 4.42 acres, a correct description of which areas in conflict is contained in the complaint herein. That thereafter and on the twentieth day of September, 1896, defendant filed in the United States land office in the city of Spokane, application for patent for said alleged Mountain View mining claim, survey No. 351, which together with the plat and field-notes of said alleged Mountain View mining claim, made by or under the direction of the United States surveyor general, showing the boundaries

of the said alleged Mountain View mining claim, and also posted a copy of said plat, together with a notice of such application for patent in a conspicuous place on the land embraced in said
77 plat, and also filed in said land office an affidavit of two persons that said notice was duly posted upon said premises, and filed in said land office a copy of such notice; and that thereafter, and on the first day of October, 1896, the register of said land office published in the "Northport News," a weekly paper published nearest said claim, a notice that said application for patent had been made, which said notice was first published on the 1st day of October, 1896, and was thereafter published once in each week for ten consecutive weeks.

8th. That on the twenty-sixth day of November, 1896, and within the sixty days' period of publication of said notice, these plaintiffs duly filed with the register and receiver of said United States land office, at the city of Spokane, their protest and adverse claim against said application for patent to the Mountain View mining claim, which protest and adverse claim was duly signed and verified by the affidavits of these plaintiffs, protestants therein, and which said protest and adverse claim duly set forth the nature, boundaries and extent of their said adverse claim, as required by law.

9th. That these plaintiffs within thirty days after filing the said protest and adverse claim as aforesaid, instituted this suit in the superior court of the State of Washington in and for Stevens county in aid of said adverse claim and to determine the right of possession to said portions of said Columbia and Kruger mining claims so as aforesaid in conflict herein, which said suit was thereafter duly removed to this court.

78 10th. Either of the parties to this suit may introduce such other or further affirmative testimony in support of their title or right to the premises in controversy as they deem necessary; but neither shall have the right to deny any of the specific facts herein stipulated.

11th. This stipulation is intended to admit the validity of the location of the said Mountain View claim in all respects, if at the time the same was located the lands embraced therein were subject to location as a mineral claim; and it is also intended to admit the validity of the locations of the plaintiffs' mineral claims, the Columbia or Gray Eagle and Kruger or Exchequer, in all respects, if the court determines that at the date of the location thereof the lands on which the same are situated were vacant and subject to location as mineral claims, defendant's pretended mineral claim being prior in point of time.

Dated at Spokane, Washington, September 15, 1897.

W. T. STOLL,
Attorney for Plaintiffs.
W. B. HEYBURN,
Attorney for Defendant.

DAVE O'NEIL,
W. D. McFADDEN,
W. E. HARRIS,
C. W. VEDDER, *Plaintiffs.*

(Endorsed:) No. —. In the circuit court, district of Washington, eastern division. McFadden *et al.*, plaintiff-, *vs.* Mountain View Mining & Milling Company, defendant. Stipulated facts.
79 Due service of within — by receipt of a true copy thereof admitted this — day of ——. —— ——, attorney for —. Filed Sept. 17, 1897. A. Reeves Ayres, clerk, by James O'Neill, deputy. Stoll & Macdonald, the Rookery, Spokane, Wash., attorney- for —.

(Here follows map marked p. 80.)

80 "EXHIBIT A."

UNITED STATES OF AMERICA, } ss:
District of Washington, }

I, A. Reeves Ayres, clerk of the circuit court of the United States for the ninth judicial circuit, district of Washington, do hereby certify the foregoing to be a full, true and correct copy of the map "Exhibit A" as attached to stipulation filed Sept. 17, 1897, in the above-entitled case, as the same appears on file in said court.

Attest my hand and the seal of the said circuit court twenty-sixth day of September, 1898.

[SEAL.] A. REEVES AYRES, *Clerk*,
By JAMES O'NEILL, *Deputy*.

81 And afterwards, to wit: on the twenty-first day of April, 1898, there was duly filed in said court, in said cause, opinion of the court in the words and figures following, to wit:

In the Circuit Court of the United States for the District of Washington, Eastern Division.

W. D. McFADDEN ET AL., Plaintiffs, *vs.* MOUNTAIN VIEW MINING & MILLING COMPANY, Defendant.	Filed April 21, 1898.

Opinion.

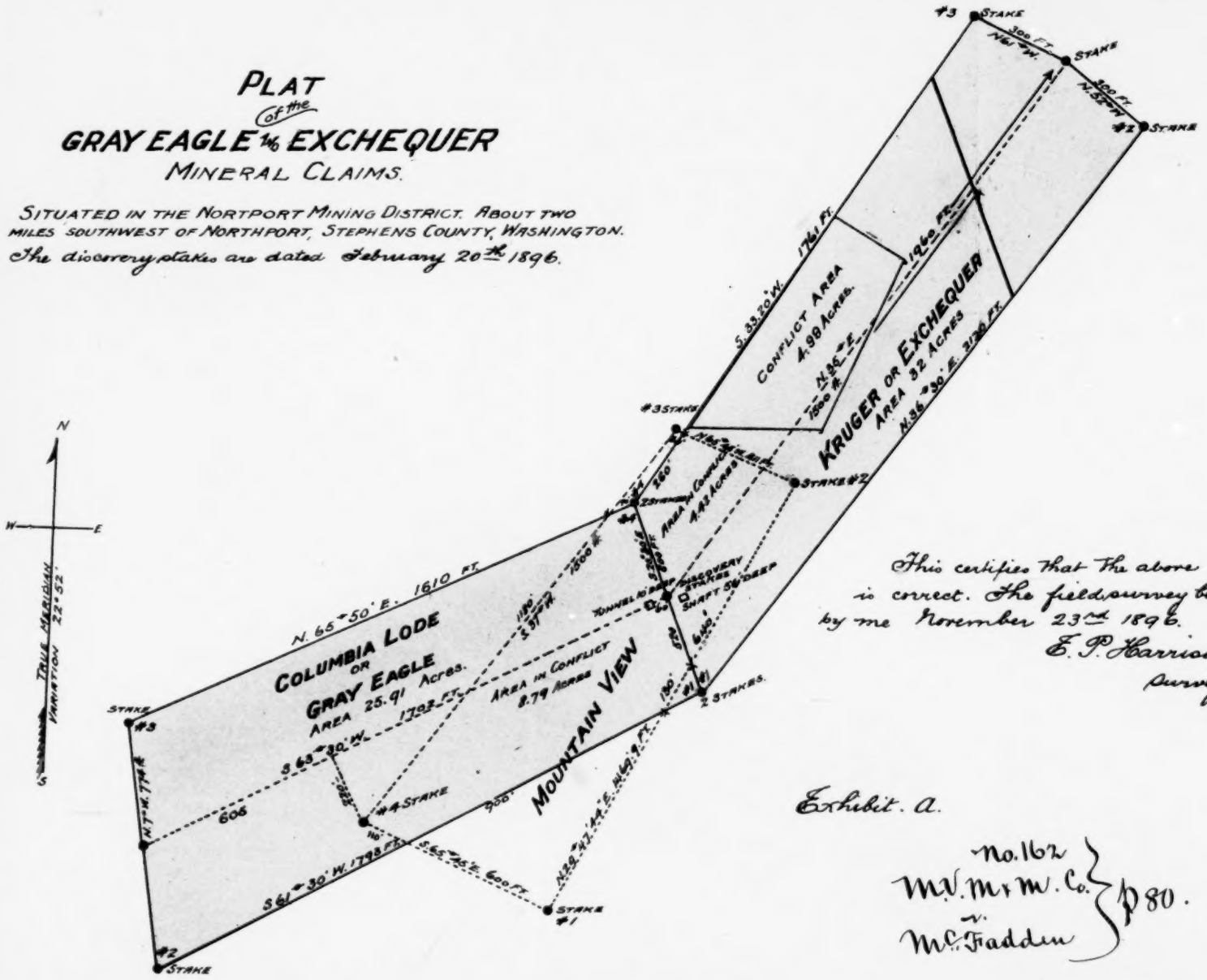
Stoll & McDonald, for plaintiffs.
W. B. Heyburn, for defendant.

HANFORD, *District Judge:*

This action was commenced pursuant to section 2326 Revised Statutes, for the purpose of securing an adjudication of adverse claims to mining ground. A written stipulation setting forth all the material facts has been signed by all the parties and filed. By said stipulation all questions which have been in dispute between the parties are settled, or eliminated from the case, except the question as to the lawfulness of the original location of the vein, or lode claim, called the Mountain View lode, made on the sixteenth day

PLAT
of the
GRAY EAGLE 1/6 EXCHEQUER
MINERAL CLAIMS.

SITUATED IN THE NORTPORT MINING DISTRICT. ABOUT TWO MILES SOUTHWEST OF NORTHPORT, STEPHENS COUNTY, WASHINGTON.
The discovery stakes are dated February 20th 1896.



This certifies that the above plat is correct. The field survey being made by me November 23rd 1896.

E. P. Harrison
Surveyor

Exhibit. a.

No. 162
M.V. M. & M. Co.
v.
Mc. Fadden
$80.

of October, 1895, by Charles N. Collins, grantor of the de-
82 fendant corporation; and the plaintiffs concede that the re-
quirements of the law as to the manner of making a mineral location were in all respects observed by Collins, and he was in every respect qualified to locate and claim mineral lands under the laws of the United States, therefore, said location was lawful if said land was at the date of said location open to exploration by mining prospectors and subject to location under the general laws of the United States. The land is situated within the limits of the tract described in the first section of the act of Congress, passed without approval by the President July 1, 1892, entitled "An act to provide for the opening of a part of the Colville reservation, in the State of Washington, and for other purposes" (27 U. S. Stat., 62). It is the defendant's contention that although said tract was not by said statute placed on the market for sale, nor opened to settlement, it was restored to the public domain and from the date of the act ceased to be a reservation and was brought under the provision of section 2319 Revised Statutes relating to the mineral lands of the United States, which section expressly declares: "All valuable mineral deposits in lands belonging to the United States, both surveyed and unsurveyed, to be free and open to exploration and purchase, and the lands in which they are found to occupation and purchase by citizens of the United States and those who have declared their intention to become such." The plaintiffs controvert this proposition and they insist that a proclamation by the President, as pro-
vided in said act, is necessary to segregate the tract to be re-
83 stored to the public domain from the reservation, and that
no individual could lawfully initiate a right within the limits of said tract, under any of the general laws relating to the public lands of the United States, at any time prior to the act of Congress, approved Feb. 20, 1896, entitled "An act to extend the mineral land laws of the United States to lands embraced in the north half of the Colville Indian reservation" (29 U. S. Stat., 9).

In the decision of this court in the case of Collins *v.* Bubb, 73 Fed. Rep., 735, the provisions and the history of the act of 1892 are set forth, and an interpretation of the act is given which fully sustains the contention of the defendant in this case. The plaintiffs ask the court to consider the question again, and they argue that the interpretation of the act given in the case cited is contrary to the intention of Congress, as shown by the words of the act and by subsequent legislation, and by the contemporaneous interpretation given by executive officers of the Government.

I have considered the argument with due care and patience, but without discovering any basis for the contention that the words of the act show intention in the legislative mind to enact a law which should lay dormant until at time in the future when the President should put vitality and force into it by an executive proclamation. As I endeavored to show in the decision in the case of Collins *v.* Bubb, the first section provides for two things, viz: Restoration to the body of the public domain of part of the land which by an

executive order had been set apart for an Indian reservation;
84 and, second, the opening to settlement of the part restored.

The act itself, by positive words in the present tense free from ambiguity, accomplishes fully the first object of the law. It is true that the tract described is not restored unconditionally, but the restrictions and conditions are clearly defined, and by the rule, *expressio unius est exclusio alterius*, there can be no additional implied restrictions or conditions. Congress intended to secure to the Indians the right of first choice of such parts of the tract as they are entitled by the provisions of the act to have allotted to them in severalty, and, to avoid all danger of conflicting claims and disputes between them and white settlers, power to fix a date in the future when the tract should be opened to settlement, and entry was vested in the President. It was so provided in order to afford time for the Indian allotments to be made before the first white settlers should be permitted to come upon the tract. There can be no such conflicting claims as to lands containing valuable deposits of mineral, for the reason that such lands are not subject to selection for allotment to Indians. The attorneys for the plaintiffs have cited an instructive opinion by Judge Sanborn, in the case of Hartman *v.* Warren, 76 Fed. Rep., 157, in which words and phrases frequently used in the laws of the United States relating to the public lands, are explained. According to my understanding of the opinion, the court held that the phrase "pre-emption entry" has a particular meaning in land-office practice, and when used in a statute relating to public land it is to be understood in a restrictive sense, rather than comprehensively, as being applicable to all cases in which
85 a particular person may have a right to be preferred to others in the purchase or acquisition of public lands. This agrees with my own views as to the true interpretation of the statutes, as expressed in the case of Collins *v.* Bubb.

In 1896 Congress by two special acts, extended the mineral land laws, so as to apply to the tract which was by the act of 1892 declared to be restored to the public domain, and granted a right of way across said tract to a railway company. The argument from this is that these enactments were unnecessary if the act of 1892 did of itself, *eo instanti*, take the tract out of the reservation and restore it to the public domain, that Congress would not do a vain thing, and therefore it must be presumed that the act of 1892, as construed and understood by Congress, remains ineffective. This is not a necessary inference. The executive branch of the Government having denied the rights of prospectors and miners and railroad builders, Congress may well have considered that a sufficient reason for additional legislation. Certainly the acts do not show a disposition on the part of Congress to acquiesce of the rulings of the Interior Department, but rather a continuity of purpose to remove the barriers in the way of mining operations and the construction of highways, which purpose was first intimated by the act of August 19, 1890 (26 U. S. Stat., 355), providing for a commission to negotiate with the Colville Indians for relinquishment of part of

their reservation, then plainly expressed in the report to the
86 House of Representatives by its Committee on Indian Affairs which preceded the enactment of the law of 1892, and finally persisted in and made emphatic by these two enactments in 1896.

It must be conceded that the construction of the act of 1892 by executive officers of the Government is contrary to the opinion of this court. But with all due deference I must decide according to my own understanding of the law. The opinions of officers of the Interior Department "are entitled to careful consideration and may well be permitted to lead the way to the proper construction of an ambiguous statute, but where the words of an act of Congress are plain and their meaning is clear, they must prevail. Webster *v.* Luther, 16 Sup. Ct., 963-967; U. S. *v.* Tanner, 147 U. S., 661-663; 13 Sup. Ct., 436; Merritt *v.* Comeron, 137 U. S., 542; 11 Sup. Ct., 174; U. S. *v.* Graham, 110 U. S., 219; 3 Sup. Ct., 582; Swift Co. *v.* U. S., 105 U. S., 691." (Hartman *v.* Warren, 76 Fed. Rep., 162.) I am confirmed in the opinion given in Collins *v.* Bubb, and will follow it in this case.

Findings and a judgment may be prepared awarding to the defendant all of the ground included within the lines of the Mountain View Lode claim; and to the plaintiffs only the land within the lines of their several claims, and not included within the defendant's lines. The defendant will also recover costs.

C. H. HANFORD, *Judge.*

(Endorsed:) No. —. In the circuit court of the United States for the district of Washington. W. D. McFadden *et al. vs.*
87 Mountain View Mining & Milling Co. Opinion. Filed April 21, 1898. A. Reeves Ayres, clerk, by —— ——, deputy.

And afterwards, to wit, on the twenty-third day of April, 1898, there *was* duly filed in said court in said cause findings of fact and conclusions of law, in the words and figures following, to wit:

In the Circuit Court of the United States in and for the District of Washington, Eastern Division.

W. D. McFadden, David O'Neil, Charles W. Vedder, and W. E. Harris, Plaintiffs,
vs.
The Mountain View Mining & Milling Company, Defendant.

Findings of Facts and Conclusions of Law.

Findings of fact.

The above-entitled cause came on regularly to be heard on the seventeenth day of September, A. D. 1897, whereupon the parties plaintiff and defendant, in open court, by a stipulation in writing signed by the parties and filed herein, waived trial by jury, and

presented and filed an agreed statement of the facts of the
88 case, on behalf of the plaintiffs and defendant, and, after argument of counsel for the respective parties, the court took the matter under advisement, and now, on this twenty-third day of April, A. D. 1898, the court finds the facts as stipulated between the parties hereto, and the stipulation on file herein is adopted as the findings of the court. And the court further finds:

I.

That as a matter of fact, the location of the Mountain View Lode mining claim made by Charles N. Collins, on the sixteenth day of October, A. D. 1895, was made upon the vacant and unoccupied public mineral lands of the United States, which were open and subject to the location of mining claims under the provisions of the laws of the United States regulating the location of mining claims.

II.

That since the said sixteenth day of October, 1895, the location of the said Mountain View Lode mining claim has been a valid and existing mining claim, and at the time of the commencement of this action, and the submission of the same at the trial herein, defendant was the owner of the said Mountain View Lode mining claim, and every part thereof.

III.

That at the time of the location of the mining claims called the Columbia, Kruger, Grey Eagle and Exchequer, under which the plaintiffs in this action claim, so much of the land and
89 premises claimed by said locations as was included in the valid location of the Mountain View Lode claim was not subject to location by the plaintiffs, or any other person.

C. H. HANFORD, *Judge.*

Conclusions of Law.

I.

That the defendant has made an application for patent for the Mountain View Lode mining claim, and has taken all of the necessary steps in making such application as are prescribed by law and the rules and regulations of the General Land Office, and is entitled to receive a patent from the United States for the said Mountain View mining claim, and every part thereof.

II.

That the plaintiffs are not entitled to any part of the land premises in controversy, claimed as the Mountain View Lode mining claim.

IV.

That the defendant is entitled to a judgment for the premises in controversy and for its costs of suit.

C. H. HANFORD, *Judge.*

(Endorsed:) No. —. In the circuit court of the United States in and for the district of Washington, eastern division. W. D. McFadden *et al. vs.* The Mountain View Mining & Milling Company. Finding of fact and conclusions of law. Filed April 23, 1898. A. Reeves Ayres, clerk, by James O'Neill, deputy. W. B. Heyburn, attorney for defendant, 303 Hyde block, Spokane, Wash. Ent. L. R. B., page 326.

And afterwards, to wit, on the twenty-third day of April, 1898, there was duly filed and entered in said court in said cause a judgment in the words and figures following, to wit:

In the Circuit Court of the United States in and for the District of Washington, Eastern Division.

W. D. McFadden, David O'Neil, Charles W. Vedder, and W. E. Harris, Plaintiffs,

vs.

The Mountain View Mining & Milling Company, Defendant.

Judgment.

This cause having come on regularly for trial before the court, and a jury having been waived by stipulation in writing by the respective parties, which said waiver was filed in the court and the cause having been submitted upon an agreed statement of facts, and the court having found the facts as stipulated, and hereby adopting said stipulated facts as the findings of this court, and the court having heard argument of counsel for the respective parties and being fully advised in the premises—

It is hereby considered and adjudged that the defendant The Mountain View Mining & Milling Company is entitled to the possession of all and singular the land and premises applied for as the Mountain View Lode mining claim, United States survey No. 351, bounded and described as follows, to wit, commencing at corner No. 1 whence the northwest corner of section 18, township 39, north range 40 east, bears south 25 degrees 58 minutes east, 7,519.86 feet; thence running north 29 degrees 47 minutes 44 seconds east, 1,469.90 feet to corner No. 2; thence north 65 degrees 45 minutes west, 411 feet to corner No. 3; thence south 37 degrees west, 1,500 feet to corner No. 4; thence south 65 degrees 45 minutes east, 600 feet to corner No. 1, and place of beginning. Said claim being situated in Stevens county, in the State of Washington. And that the said defendant is entitled to enter the same for patent as applied for.

That the Mountain View Lode mining claim is a valid and existing mining claim, located on the sixteenth day of October, A. D. 1895.

That the defendant have and recover its costs in this action, amounting to the sum of sixty-three and $\frac{75}{100}$ dollars.

Dated this 23rd day of April, A. D. 1898.

C. H. HANFORD, *Judge.*

(Endorsed:) No. —. In the circuit court of the United
92 States in and for the district of Washington, eastern division. W. D. McFadden *vs.* The Mountain View Mining & Milling Co. Judgment. Filed April 23, 1898. A. Reeves Ayres, clerk, by James O'Neill, deputy. W. B. Heyburn, attorney for defendant, 303 Hyde block, Spokane, Wash. Ent. J. R, page 99.

And afterwards, to wit, on the twenty-third day of April, 1898, there *was* duly filed in said court in said cause exceptions, in the words and figures following, to wit:

In the Circuit Court of the United States in and for the District of Washington, Eastern Division.

W. D. McFADDEN, DAVID O'NEIL, CHARLES W. VEDDER, and W. E. Harris, Plaintiffs,

vs.

THE MOUNTAIN VIEW MINING & MILLING COMPANY, Defendant.

Exceptions.

The court having on this twenty-third day of April, 1898, made and entered certain findings of fact, separate and apart from the stipulated facts herein, and having likewise, on said twenty-third day of April, 1898, made and filed herein conclusions of law, and entered a judgment herein, the plaintiffs now at this time except:

93 1. To all of the first of such findings of fact, so made by the court.

2. To all of the second of such findings of fact so made by the court.

3. To all of the third of said findings of facts, so made by the court.

4. To all of the following portion of the first of said conclusions of law, so made by the court, to wit: "And is entitled to receive a patent from the United States for the said Mountain View mining claim, and every part thereof."

5. To all of the second of said conclusions of law, so made by the court.

6. To all of the third (marked IV) of said conclusions of law, so made by the court.

7. To the judgment of the court, made and entered herein in favor of the defendant and against the plaintiffs, and dated this twenty-third day of April, 1898, and to the whole of such judgment.

Dated this twenty-third day of April, 1898.

STOLL, STEPHENS, BUNN & MACDONALD,
ALBERT ALLEN,
Attorneys for the Plaintiffs.

The foregoing exceptions were presented to me on this twenty-third day of April, 1898, and were by me duly allowed.

C. H. HANFORD, *Judge.*

I hereby admit service of a copy of the foregoing exceptions and order of the court allowing the same.

——— ———,
Attorney for the Defendant.

94 STATE OF WASHINGTON, } ss.:
County of Spokane, }

E. T. White, being first duly sworn, on oath states: I am over twenty-one years of age and competent to be a witness in the within-entitled action, and not the plaintiff therein; that at the hour of three o'clock p. m., on the twenty-third day of April, 1898, at the office of W. B. Heyburn, attorney for defendant herein, in the county of Spokane, and State of Washington, I personally served the foregoing exceptions on W. B. Heyburn, attorney for defendant, by delivering to Wm. B. Sams, a law clerk of said W. B. Heyburn, a true copy of said exceptions.

E. T. WHITE.

Subscribed and sworn to before me this twenty-third day of April, 1898.

E. C. MacDONALD,
Notary Public in and for the State of Washington,
[SEAL.] *Residing at Spokane.*

(Endorsed:) No. —. In the circuit court of the United States, district of Washington, eastern division. W. D. McFadden *et al.*, plaintiff-, *vs.* Mountain View Mining & Milling Company, defendant. Exceptions. Due service of within — by receipt of a true copy thereof admitted this —, day of ———. ——— ———, attorney for —. Filed April 23, 1898. A. Reeves Ayres, clerk, by James O'Neill, deputy. Stoll, Stephens, Bunn & MacDonald, the Rookery, Spokane, Wash., attorneys for plaintiffs.

95 And afterwards, to wit, on the twenty-third day of April, 1898, there *was* duly filed and entered in said court in said cause an order staying proceedings and an order fixing bond, in the words and figures following, to wit:

In the Circuit Court of the United States in and for the District of Washington, Eastern Division.

W. D. McFADDEN ET AL., Plaintiffs,
vs.
THE MOUNTAIN VIEW MINING & MILLING COMPANY, Defendant.

Order Staying Proceedings.

In this case the court having ordered a judgment to be entered in favor of the defendant, and the plaintiffs having expressed a desire

to take a writ of error to the court of appeals from the said decision—

Now, on plaintiffs' motion, it is ordered that, for the purpose of enabling the plaintiffs to perfect and procure their writ of error, all proceedings on the judgment in this case be, and the same are hereby, stayed for the period of ten days.

Dated this twenty-third day of April, A. D. 1898.

C. H. HANFORD, *Judge.*

96 (Endorsed:) No. —. In the circuit court of the United States, district of Washington, eastern division. W. D. McFadden *et al.*, plaintiff, *vs.* Mountain View Mining & Milling Company, defendant. Order for stay of proceedings. Due service of within — by receipt of a true copy thereof admitted this — day of ——. —— ——, attorney for —. Filed April 23, 1898. A. Reeves Ayres, clerk. Stoll, Stephens, Bunn & MacDonald, the Rookery, Spokane, Wash., attorneys for plaintiffs. Ent. L. R. B., page 326.

In the United States Circuit Court in and for the District of Washington, Eastern Division.

W. D. McFadden, David O'Neil, Charles W. Vedder, and W. E. Harris, Plaintiffs,

vs.

The Mountain View Mining & Milling Company, Defendant.

Order Fixing Bond.

On plaintiffs' motion to fix the amount of the supersedeas and cost bond herein, with a view of prosecuting a writ of error,

97 it is ordered by the court that if the plaintiffs desire a stay of execution, they shall be required to furnish a supersedeas bond to the defendant in the sum of two thousand five hundred dollars ($2,500); but if the plaintiffs do not desire a stay of execution, and do not see fit to file such supersedeas bond and still desire to prosecute a writ of error to the circuit court of appeals herein, they shall furnish a bond for the payment of costs to the defendant in the sum of two hundred and fifty dollars.

Done in open court, this twenty-third day of April, 1898.

C. H. HANFORD, *Judge.*

(Endorsed:) No. —. In the circuit court of the United States, district of Washington, eastern division. W. D. McFadden *et al.*, plaintiff, *vs.* Mountain View Mining & Milling Company, defendant. Order. Filed April 23, 1898. A. Reeves Ayres, clerk, by James O'Neill, deputy. Stoll, Stephens, Bunn & MacDonald, the Rookery, Spokane, Wash., attorneys for plaintiffs. Ent. L. R. B., page 325.

And afterwards, to wit, on the twenty-sixth day of April, 1898, there *was* duly filed in said court in said cause a notice and a bill of exceptions, in the words and figures following, to wit:

98 In the Circuit Court of the United States in and for the District of Washington, Eastern Division.

W. D. McFADDEN, DAVID O'NEIL, CHARLES W. VEDDER, and W. E. Harris, Plaintiffs,
vs.
THE MOUNTAIN VIEW MINING & MILLING COMPANY (a Corporation), Defendant.

Notice of Filing Proposed Bill of Exceptions.

To the defendant in the above-entitled action and to W. B. Heyburn, attorney for the defendant:

Take notice that the plaintiffs have prepared and filed with the clerk of the above-named court their proposed bill of exceptions in the above-entitled cause, a copy of which is herewith served upon you.

Dated this April 26, 1898.

STOLL, STEPHENS, BUNN & MACDONALD,
ALBERT ALLEN,
Attorneys for the Plaintiffs.

(Endorsed:) No. —. In the circuit court of the United States, district of Washington, eastern division. W. D. McFadden *et al.*, plaintiff-, *vs.* Mountain View Mining & Milling Company, de-
99 fendant. Notice of filing proposed bill of exceptions. Receipt of a true copy thereof admitted this twenty-sixth day of April, 1898. W. B. Heyburn, attorney for defendant. Filed April 26, 1898. A. Reeves Ayres, clerk. Stoll, Stephens, Bunn & MacDonald, the Rookery, Spokane, Wash., attorneys for plaintiffs.

In the Circuit Court of the United States in and for the District of Washington, Eastern Division.

W. D. McFADDEN, DAVID O'NEIL, CHARLES W. VEDDER, and W. E. Harris, Plaintiffs,
vs.
THE MOUNTAIN VIEW MINING & MILLING COMPANY (a Corporation), Defendant.

Bill of Exceptions.

Be it remembered, that this cause came on regularly to be heard on the seventeenth day of September, 1897; whereupon the parties, plaintiffs and defendant, in open court, by a stipulation in writing, signed by the parties and filed herein, waived trial by jury, and presented and filed an agreed statement of facts in the case on behalf of plaintiffs and defendant, which agreed statement of facts, excepting the title, is in the words and figures as follows, to wit:

100 "Come now the plaintiffs and defendant, and expressly waiving a jury herein, hereby stipulate that the following shall be and are the agreed facts in this cause, and that the same shall be taken for all purposes as the findings of fact of the court herein:

"1st. That the plaintiffs, O. E. Cox, the grantor of the plaintiff Charles W. Vedder, and Charles N. Collins, the grantor of the defendant, were at all times mentioned in the pleadings and now are citizens of the United States, over the age of twenty-one years.

"2nd. That the defendant now is and at all times mentioned in the pleadings herein has been a corporation duly organized, created and existing under and by virtue of the laws of the State of Washington.

"3rd. That on the sixteenth day of October, 1895, one Charles N. Collins went upon the premises in the north half of the Colville Indian reservation, in the county of Stevens and State of Washington, claiming the same to be public lands of the United States, situated on the west side of the Columbia river about three miles southwesterly from the town of Northport and about one mile back from said Columbia river and about four miles north from the Little Dalles on said river; and the said Collins then and there made a discovery of a ledge of mineral-bearing rock in place carrying silver, lead and other precious and valuable metals, and after making the said discovery the said Collins then and there pretended to locate a mining claim based upon said discovery, and called said mining claim the Mountain View, which is the same mining claim

101 described in the answer of the defendant herein, and which is correctly delineated upon and described in the map hereto attached, marked Exhibit 'A,' and made a part hereof, and which is the same mining claim for which the defendant has applied for patent from the United States, and the title of which is involved in this suit. That the said Collins after making said discovery of a ledge upon the Mountain View Lode mining claim so as aforesaid, then and there posted a notice of location at the point of such discovery, describing the ground claimed in said location, the number of feet claimed along said ledge and on each side thereof, together with the name of the claim, the name of the locator and the date of the location; and then and there marked said location upon the ground so that its boundaries could be distinctly traced, by placing at each corner and at the center of each end line of said claim a substantial post more than four inches in diameter and more than four feet high, squared and marked to indicate the position of such post upon said claim. That thereafter and on the twenty-first day of October, 1895, the said Collins filed for record in the office of the recorder of said Stevens county what was substantially a copy of the notice of location so posted by him as aforesaid upon the Mountain View Lode claim. That thereafter, to wit, on the twenty-ninth day of November, 1895, the said Collins did file in said auditor's office an amended notice of location of the said Mountain View mining claim for the purpose of more particularly describing the said claim with reference to natural objects and permanent monu-

ments, for the identification of the same. That defendant
102 herein has succeeded by due and regular conveyance to whatever right, title, and interest said Collins acquired under and by virtue of such location. That defendant has performed upon said claim the amount of labor required by the laws of the United States.

"4th. That thereafter and on Feb. 20, 1896, the plaintiffs, W. D. McFadden, David O'Neil, W. E. Harris, and one O. E. Cox, the grantor in interest of the plaintiff Charles W. Vedder, entered upon the north half of the Colville Indian reservation, in the county of Stevens and State of Washington, claiming the same to be public lands of the United States, and then and there discovered therein a vein or lode of rock in place bearing gold, silver, and other precious metals, and then and there pretended to locate a mineral claim thereon, called by them the Columbia Lode mining claim, claiming fifteen hundred feet in length along said lode so discovered and three hundred feet in width on each side of the center of said vein or lode at the surface throughout the length of said claim and which said claim is more particularly described as follows, to wit: That certain lode mining claim known as and called the Columbia Lode mining claim, situated on the north side of and about one and one-quarter miles from the Columbia river and about two and one-half miles west of the town of Northport in the county of Stevens, State of Washington, and being the same ground and premises sometimes called the Gray Eagle lode. That thereupon the said locators posted a notice of location upon said claim at the point of discovery thereof, and described said location and marked said location upon the ground, so that the boundaries thereof could be readily
103 traced; that thereafter, on Feb. 20, 1896, said locators duly filed and caused to be recorded in the office of the county auditor of said county of Stevens a notice of location of said Columbia Lode mining claim containing the names of said locators, the date of location, and such a description of the claim so located, by reference to natural objects and permanent monuments, as to identify the same, and that said locators in all other respects complied with the laws of the United States and the laws of the State of Washington, and the local rules and customs of the miners of the district in which said claim was situated, governing the location and manner of recording mineral claims. That the plaintiff Charles W. Vedder has succeeded by regular conveyance to the right, title, and interest of the said O. E. Cox in said claim, and that the plaintiffs are at this time invested with such title to said claim as said locators acquired by virtue of such location. That the plaintiffs have complied with the laws of the United States and of the said State, and the local rules and customs of the miners of said district relative to the said district for holding and working of mining claims on the public lands of the United States.

"5th. That on the said twentieth day of February, 1897, the plaintiffs W. D. McFadden, David O'Neil, W. E. Harris, and one O. E. Cox, the grantor in interest of plaintiff Charles W. Vedder, entered upon the north half of the Colville Indian reservation, in the county of

Stevens, State of Washington, claiming the same to be public lands of the United States, and then and there discovered therein a vein or lode of rock in place bearing gold, silver, and other precious
104 metals, and then and there pretended to locate a mineral claim thereon called by them the Kruger Lode mining claim, claiming fifteen hundred feet in length along said vein or lode so discovered and three hundred feet in width on each side of the center of said vein at the surface throughout the length of said claim, and which said claim is more particularly described as follows, to wit: That certain lode mining claim known as and called the Kruger Lode mining claim, situated on the north side of and about one and one-quarter miles from the Columbia river, and about two and one-half miles west of the town of Northport, in said county of Stevens, State of Washington, and being east of and adjoining the Columbia Lode mining claim herein described, and being the same premises sometimes called the Exchequer Lode mining claim, said claim being fifteen hundred feet in length along the vein and three hundred feet in width on each side of the center of said vein throughout the length of said claim. And then and there posted at the point of discovery of said claim a notice of location thereof, describing said claim, and then and there marked said location on the ground so that the boundaries thereof could be readily traced; and thereafter and on Feb. 20, 1896, the said locators filed and recorded in the office of the county auditor in the said county of Stevens, a notice of location of said Kruger Lode mining claim, containing the names of said locators, the date of said location, and such a description of the claim so located, by reference to natural objects and permanent monuments, as would identify the said claim, and fully complied with the laws of the United States and the State of Washington, and the local rules and customs of the miners
105 of the district in which said claim was located, governing the location of mining claims. That the plaintiff Vedder has succeeded by regular conveyance to the right, title, and interest of said Cox in said claim, and that the plaintiffs are at this time invested with such title to said claim as said locators acquired by virtue of such location. That the plaintiffs have complied with the laws of the United States and of the said State and the local rules and customs of the miners of said district relative to holding and working mining claims on the public lands of the United States.

"6th. That the map hereto attached marked Exhibit 'A,' and made a part hereof, correctly shows the said several mining claims and the relation the same bear to each other, together with the areas in conflict.

"7th. That on the — day of ——, 1896, the defendant caused the said Mountain View mining claim to be officially surveyed for patent, being United States official survey No. 351, and that the same as surveyed overlapped and included so much of the Columbia or Gray Eagle claim, claimed by plaintiffs, as is shown on the map hereto attached and marked 'Exhibit A,' and denominated and de-

scribed thereon as 'area in conflict,' and containing 8.79 acres; that said survey also overlapped and included so much of the Kruger or Exchequer mining claim and claimed by plaintiffs as is shown on said map, denominated and described thereon as 'area in conflict' and containing 4.42 acres, a correct description of which areas in conflict is contained in the complaint herein. That there-
106 after and on the twentiesh day of September, 1896, defendant filed in the United States land office in the city of Spokane, application for patent for said alleged Mountain View mining claim, survey No. 351, which together with the plat and field-notes of said alleged Mountain View mining claim, made by or under the direction of the United States surveyor general, showing the boundaries of the said alleged Mountain View mining claim, and also posted a copy of said plat, together with a notice of such application for patent in a conspicuous place on the land embraced in said plat, and also filed in said land office an affidavit of two persons that said notice was duly posted upon said premises, and filed in said land office a copy of such notice; and that thereafter and on the first day of October, 1896, the register of said land office published in the 'Northport News,' a weekly newspaper published nearest said claim, a notice that said application for patent had been made, which said notice was first published on the first day of October, 1896, and was thereafter published once in each week for ten consecutive weeks.

"8th. That on the twenty-sixth day of November, 1896, and within the sixty days' period of publication of said notice these plaintiffs duly filed with the register and receiver of said United States land office, at the city of Spokane, their protest and adverse claim against said application for patent to the Mountain View mining claim, which protest and adverse claim was duly signed and verified by the affidavits of these plaintiffs, protestants therein, and which said protest and adverse claim duly set forth the nature, boundaries and extent of their said adverse claim, as required by law.

107 "9th. That these plaintiffs within thirty days after filing the said protest and adverse claim as aforesaid instituted this suit in the superior court of the State of Washington in and for Stevens county in aid of said adverse claim and to determine the right of possession to said portions of said Columbia and Kruger mining claims so as aforesaid in conflict herein; which suit was thereafter duly removed to this court.

"10th. Either of the parties to this suit may introduce such other or further affirmative testimony in support of their title or right to the premises in controversy as they deem necessary; but neither shall have the right to deny any of the specific facts herein stipulated.

"11th. This stipulation is intended to admit the validity of the location of the said Mountain View claim in all respects, if at the time the same was located the lands embraced therein were subject to location as a mineral claim; and it is also intended to admit the validity of the locations of the plaintiffs' mineral claims, the Co-

lumbia or Gray Eagle and Kruger or Exchequer, in all respects, if the court determines that at the date of the location thereof the lands on which the same are situated were vacant and subject to location as mineral claims, defendant's pretended mineral claim being prior in point of time.

108 "Dated at Spokane, Washington, September 15, 1897.

"W. T. STOLL,
"*Attorneys for Plaintiffs.*
"W. B. HEYBURN,
"*Attorney for Defendant.*

"DAVID O'NEIL,
"W. D. McFADDEN,
"W. E. HARRIS,
"C. W. VEDDER,
"*Plaintiffs.*"

Whereupon, after argument of counsel, said cause was submitted to the court for its decision, and the court took the same under advisement.

And be it further remembered, that thereafter, and on the twenty-third day of April, 1898, the court made its findings of fact and conclusions of law herein; which findings of fact and conclusions of law, excepting the title, are in the words and figures as follows:

"*Findings of Fact and Conclusions of Law.*

"Findings of fact.

"The above-entitled cause came on regularly to be heard on the seventeenth day of September, A. D. 1897, whereupon the parties, plaintiff and defendant, in open court, by a stipulation in writing signed by the parties and filed herein, waived trial by jury, and presented and filed an agreed statement of the facts of the case on behalf of the plaintiffs and defendant, and after argument of counsel for the respective parties, the court took the matter under

109 advisement, and now, on this twenty-third day of April, A. D. 1898, the court finds the facts as stipulated between the parties hereto, and the stipulation on file herein is adopted as the findings of the court. And the court further finds:

"I.

"That as a matter of fact, the location of the Mountain View Lode mining claim, made by Charles N. Collins, on the sixteenth day of October, A. D. 1895, was made upon the vacant and unoccupied public mineral lands of the United States, which were open and subject to the location of mining claims under the provisions of the laws of the United States regulating the location of mining claims.

"II.

"That since the said sixteenth day of October, 1895, the location of the said Mountain View Lode mining claim has been a valid

and existing mining claim, and at the time of the commencement of this action, and the submission of the same at the trial herein, defendant was the owner of the said Mountain View Lode mining claim, and every part thereof.

"III.

"That at the time of the location of the mining claims called the Columbia, Kruger, Gray Eagle, and Exchequer under which the plaintiffs in this action claim, so much of the land and premises claimed by said locations as was included in the valid location of the Mountain View Lode claim was not subject to location by the plaintiffs or any other person.

110 "*Conclusions of Law.*

"I.

"That the defendant has made an application for patent for the Mountain View Lode mining claim, and has taken all of the necessary steps in making such application, as are prescribed by law and the rules and regulations of the General Land Office, and is entitled to receive a patent from the United States for the said Mountain View mining claim, and every part thereof.

"II.

"That the plaintiffs are not entitled to any part of the land and premises in controversy, claimed as the Mountain View Lode mining claim.

"IV.

"That the defendant is entitled to a judgment for the premises in controversy and for its costs of suit.

"C. H. HANFORD, *Judge.*"

And the court thereupon ordered judgment to be entered in favor of defendant, which judgment, excepting the title, is as follows, to wit:

"This cause having come on regularly for trial before the court, and a jury having been waived by stipulation in writing by the respective parties, which said waiver was filed in the court, and the cause having been submitted upon an agreed statement of facts, and the court having found the facts as stipulated and hereby adopting said stipulated facts as the findings of this court, and the court having heard argument of counsel for the respective parties and being fully advised in the premises—

111 "It is hereby considered and adjudged, that the defendant The Mountain View Mining & Milling Company is entitled to the possession of all and singular the land and premises applied for as the Mountain View Lode mining claim, United States survey No. 351, bounded and described as follows, to wit: Commencing at corner No. 1, whence the northwest corner of section 18, township 39, north range 40 east, bears south 25 degrees 58 minutes east,

7,519.86 feet; thence running north 29 degrees 47 minutes 44 seconds east, 1,469.90 feet to corner No. 2; thence north 65 degrees 45 minutes west 411 feet to corner No. 3; thence south 37 degrees west, 1,500 feet to corner No. 4; thence south 65 degrees 45 minutes east 600 feet to corner No. 1, and place of beginning. Said claim being situated in Stevens county, in the State of Washington. And that the said defendant is entitled to enter the same for patent as applied for.

"That the Mountain View Lode mining claim is a valid and existing mining claim, located on the sixteenth day of October, A. D. 1895.

"That the defendant have and recover its costs in this action, amounting to the sum of — dollars.

"Dated this twenty-third day of April, A. D. 1898.

"C. H. HANFORD, *Judge.*"

And thereupon, on said twenty-third day of April, 1898, plaintiffs filed their exceptions to the said findings of fact, conclusions of law and judgment, which exceptions, so filed, were, on said twenty-third day of April, 1898, allowed by the court, and which, omitting the title, are in the words and figures following, to wit:

112 "The court having, on this twenty-third day of April, 1898, made and entered certain findings of fact, separate and apart from the stipulated facts herein, and having likewise, on said twenty-third day of April, 1898, made and filed herein conclusions of law, and entered a judgment herein, the plaintiffs now at this time except:

"1. To all the first of such findings of fact so made by the court.

"2. To all of the second of such findings of fact so made by the court.

"3. To all of the third of said findings of fact so made by the court.

"4. To all of the following portion of the first of said conclusions of law so made by the court, to wit: 'And is entitled to receive a patent from the United States for the said Mountain View mining claim, and every part thereof.'

"5. To all of the second of said conclusions of law so made by the court.

"6. To all of the third (marked IV) of said conclusions of law so made by the court.

"7. To the judgment of the court, made and entered herein in favor of the defendant and against the plaintiffs, and dated this twenty-third day of April, 1898, and to the whole of such judgment.

"Dated this twenty-third day of April, 1898.

"STOLL, STEPHENS, BUNN & McDONALD,
"*Attorneys for the Plaintiffs.*"

And which order of the court so allowing the same was in the words and figures, following, to wit:

113 "The foregoing exceptions were presented to me on this twenty-third day of April, 1898, and were by me duly allowed.

"C. H. HANFORD, *Judge.*"

Wherefore, to the end that the errors in law, if any, committed by the court on the trial of this cause may appear, I certify that the foregoing bill of exceptions contains all the evidence on the trial of said cause; and the said bill of exceptions is hereby settled, allowed, signed, sealed and made a record in the cause.

C. H. HANFORD, *Judge.*

Dated this fourth day of May, 1898.

(Endorsed:) No. —. In the circuit court of the United States, district of Washington, eastern division. W. D. McFadden *et al.*, plaintiff-, *vs.* Mountain View Mining & Milling Company, defendant. Bill of exceptions. Receipt of a true copy thereof admitted this twenty-sixth day of April, 1898. W. B. Heyburn, attorney for defendant. Filed April 26, 1898. A. Reeves Ayres, clerk, by James O'Neill. Stoll, Stephens, Bunn & Macdonald, the Rookery, Spokane, Wash., attorneys for plaintiffs.

And afterwards, to wit, on the twenty-sixth day of September, 1898, there was duly filed in said court in said cause a petition for a writ of error, and assignment of errors, in the words and figures following, to wit:

114 In the Circuit Court of the United States in and for the District of Washington, Eastern Division.

W. D. McFadden, David O'Neil, Charles W. Vedder, and W. E. Harris, Plaintiffs in Error, *vs.* The Mountain View Mining & Milling Company, (a Corporation), Defendant in Error.	At Law.

Petition for Writ of Error.

And now comes the plaintiffs, W. D. McFadden, David O'Neil, Charles W. Vedder and W. E. Harris, and say, that on or about the twenty-third day of April, 1898, this court entered judgment in favor of the defendant and against the plaintiffs, in which judgment and the proceedings had prior thereto in this cause certain errors were committed in prejudice of these plaintiffs, all of which will more in detail appear from the assignment of errors which is filed with this petition.

Wherefore, these plaintiffs pray that a writ of error may issue in this behalf to the United States circuit court of appeals, for the ninth circuit, for the correction of errors so complained of, and that a

transcript of the record, proceedings and papers in this cause,
115 duly authenticated, may be sent to the said circuit court of appeals.

STOLL & MACDONALD AND
ALBERT ALLEN,
Attorneys for Plaintiff.

(Endorsed:) Original. No. —. In the circuit court of the United States, district of Washington, eastern division. W. D. McFadden *et al.*, plaintiffs, *vs.* The Mountain View Mining & Milling Co., defendant. Petition for writ of error. Due service of within — by receipt of a true copy thereof admitted this — day of ——. —— ——, attorney for ——. Filed Sept. 26, 1898. A. Reeves Ayres, clerk. Stoll & Macdonald, the Rookery, Spokane, Wash., attorneys for ——.

In the Circuit Court of the United States in and for the District of Washington, Eastern Division. At Law.

W. D. McFADDEN, DAVID O'NEIL, CHARLES W. VEDDER, and W. E. Harris, Plaintiffs,
vs.
THE MOUNTAIN VIEW MINING & MILLING COMPANY (a Corporation), Defendant.

116 *Assignment of Errors.*

And now, on the twenty-sixth day of September, 1898, come the said plaintiffs, by Stoll & Macdonald and Albert Allen, their solicitors, and say that the decree in said cause is erroneous and against the just rights of said plaintiffs, for the following reasons:

I.

Because it appears from the stipulated facts in this cause that the location of the Mountain View mining claim made by Charles N. Collins on the sixteenth day of October, 1895, was made upon lands of the United States which at that time were not vacant public lands of the United States and were not subject to the location of mineral claims under the provisions of the laws of the United States regulating the location of mining claims, and the court erred in concluding as a matter of law that the same were vacant lands.

II.

That the location of the Columbia, Kruger, Gray Eagle, and Exchequer lode mining claims made on February 20, 1896, by the plaintiffs W. D. McFadden, David O'Neil, W. E. Harris, and one O. E. Cox, the grantor in interest of the plaintiff Charles W. Vedder, were made upon vacant and unoccupied mineral lands of the United States which were then and there vacant and subject to location of mineral claims under the provisions of the laws of the United States regulating the location of mining claims.

117 III.

Because the stipulated facts show that the plaintiffs, on the twenty-sixth day of November, 1896, and within the sixty days' period of publication of defendant's notice for a patent, duly filed with the register and receiver of the United States land office, at the city of Spokane, their protest and adverse claim against the application for patent to the Mountain View mining claim of defendant, which protest and adverse claim was in strict compliance with law and the rules and regulations of the General Land Office, and the court erred in not so finding.

IV.

That it appears from the stipulated facts in this case that the plaintiffs are entitled to recover a decree against the defendant for for the lands in controversy in this suit, and the refusal of the court to so find as a matter of law was error.

Wherefore, the said plaintiffs pray that the said decree be reversed and that the said court may be directed to enter a decree in accordance with the prayer of the appeal.

STOLL & MACDONALD AND
ALBERT ALLEN,
Solicitors for Plaintiffs.

(Endorsed:) Original. No. —. In the circuit court of the United States, district of Washington, eastern division. W. D. McFadden *et al.*, plaintiffs, *v.* The Mountain View Mining & Milling Co., defendant. Assignment of errors on appeal. Due service of
118 within — by receipt of a true copy thereof admitted this — day of ——. —— ——, attorney for ——. Filed Sept. 26, 1898. A. Reeves Ayres, clerk. Stoll & Macdonald, the Rookery, Spokane, Wash., attorneys for ——.

And afterwards, to wit, on the twenty-sixth day of April, 1898, there was duly filed and entered in said court in said cause an order allowing writ of error, and a bond, in the words and figures following, to wit:

In the Circuit Court of the United States in and for the District of Washington, Eastern Division. At Law.

W. D. McFadden, David O'Neil, Charles W. Vedder, and W. E. Harris, Plaintiffs in Error,
vs.
The Mountain View Mining & Milling Company (a Corporation), Defendant in Error.

Order Allowing Writ of Error.

On this twenty-sixth day of September, 1898, came the plaintiffs, by their attorneys, and filed herein and presented to the court
119 their petition praying for the allowance of a writ of error intended to be urged by them, praying that a transcript of

the record, proceedings and papers upon which the judgment herein was rendered, duly authenticated, may be sent to the United States circuit court of appeals for the ninth circuit, and that such other and further proceedings may be had as may be proper in the premises.

On consideration whereof, the court does allow the writ of error upon the said plaintiffs giving bond according to law in the sum of two hundred fifty ($250.00) dollars.

C. H. HANFORD, *Judge.*

(Endorsed:) Original. No. —. In the circuit court of the United States, district of Washington, eastern division. W. D. McFadden *et al.*, plaintiffs, *vs.* The Mountain View Mining & Milling Co., defendant. Order allowing writ of error. Due service of within — by receipt of a true copy thereof admitted this — day of ——. —— ——, attorney for ——. Filed Sept. 26, 1898. A. Reeves Ayres, clerk. Stoll & Macdonald, the Rookery, Spokane, Wash., attorneys for ——.

120 In the Circuit Court of the United States in and for the District of Washington, Eastern Division. At Law.

W. D. McFADDEN, DAVID O'NEIL, CHARLES W. VEDDER, and W. E. Harris, Plaintiffs in Error,
vs.
THE MOUNTAIN VIEW MINING & MILLING COMPANY (a Corporation), Defendant in Error.

Bond on Writ of Error.

Know all men by these presents, that we, W. D. McFadden, David O'Neil, Charles W. Vedder and W. E. Harris, as principals, and Mary B. Rugh and S. S. Glidden, as sureties, are held and firmly bound unto the defendant, The Mountain View Mining & Milling Company, in the full sum of two hundred fifty ($250.00) dollars, to be paid to the said defendant, The Mountain View Mining & Milling Company, its certain attorneys, successors, or assigns, to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, firmly by these presents.

Sealed with our seals and dated this twenty-sixth day of September, in the year of our Lord eighteen hundred and ninety-eight.

Whereas, lately at a circuit court of the United States for
121 the district of Washington, eastern division, in a suit depending in said court between the said W. D. McFadden, David O'Neil, Charles W. Vedder, and W. E. Harris, as plaintiffs, and The Mountain View Mining & Milling Company, defendant, a judgment and decree was rendered against the said W. D. McFadden, David O'Neil, Charles W. Vedder and W. E. Harris, and the said W. D. McFadden, David O'Neil, Charles W. Vedder and W. E. Harris having obtained a writ of error and filed a copy thereof in the clerk's office of the said court to reverse the judgment in the

aforesaid suit, and a citation directed to the said defendant, The Mountain View Mining & Milling Company, citing and admonishing it to be and appear at a session of the United States circuit court of appeals, for the ninth circuit, to be holden at the city of Seattle, in said circuit, on the second Monday of September next:

Now, the condition of the obove obligation is such that if the said W. D. McFadden, David O'Neil, Charles W. Vedder and W. E. Harris shall prosecute said writ of error to effect and answer all damages and costs, if they fail to make the said plea good, then the above obligation to be void, else to remain in full force and effect.

W. D. McFADDEN,
By E. C. MACDONALD,
His Attorney.

DAVID O'NEIL,
By E. C. MACDONALD,
His Attorney.

CHARLES W. VEDDER,
By E. C. MACDONALD,
His Attorney.

W. E. HARRIS,
By E. C. MACDONALD,
His Attorney.

(X) MARY B. RUGH.
S. S. GLIDDEN.

122 COUNTY OF SPOKANE, } *ss:*
State of Washington, }

Mary B. Rugh and S. S. Glidden, being duly sworn, each for himself deposes and says that he is a resident of the city and county of Spokane, State of Washington; that he is worth the sum of five hundred dollars in separate property situated within the county of Spokane and State of Washington over and above all his debts and liabilities, and exclusive of property exempt from execution.

(X) MARY B. RUGH.
S. S. GLIDDEN.

Subscribed and sworn to before me this twenty-sixth day of September, A. D. 1898.

SAM'L R. STERN,
Notary Public in and for the State of Washington,
Residing at Spokane.

[SEAL.]

This bond is hereby approved, Sept. 26, 1898.

C. H. HANFORD, *Judge.*

(Endorsed:) Original. No. —. In the circuit court of the United States, district of Washington, eastern division. W. D. McFadden *et al.*, plaintiffs, *vs.* The Mountain View Mining & Milling Co., defendant. Bond on appeal. Filed Sept. 26, 1898. A. Reeves Ayres, clerk. Stoll & Macdonald, the Rookery, Spokane, Wash., attorneys for ——.

123 And afterwards, to wit, on the twenty-sixth day of September, 1898, there was duly issued out of said court a writ of error, in the words and figures as follows, to wit:

In the Circuit Court of the United States in and for the District of Washington, Eastern Division. At Law.

W. D. McFADDEN, DAVID O'NEIL, CHARLES W. VEDDER, and W. E. Harris, Plaintiffs in Error,
vs.
THE MOUNTAIN VIEW MINING & MILLING COMPANY (a Corporation), Defendant in Error.

Writ of Error.

THE UNITED STATES OF AMERICA, *Ninth Judicial District*, } ss:

The President of the United States to the honorable judges of the circuit court of the United States for the district of Washington, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court before you or some of you, between W. D. McFadden, David O'Neil, Charles W. Vedder, and W. E. Harris, plaintiffs, and The Mountain View Mining & Milling Company, defendant, a manifest error hath appeared, to the great damage of the said W. D. McFadden,
124 David O'Neil, Charles W. Vedder, and W. E. Harris, as by their complaint appears, we being willing that error, if any hath been, shall be fully corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and the proceedings aforesaid, with all things concerning the same, to the United States circuit court of appeals for the ninth circuit, together with this writ, so that you have the same at San Francisco within thirty days from the date of this writ in said circuit court of appeals, to be then and there held, that the record and proceedings aforesaid being inspected, the said circuit court of appeals may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 26th day of September, 1898.

A. REEVES AYRES, *Clerk.*

Allowed by—
—— ——, *Judge.*

(Endorsed:) In the circuit court of the United States, district of Washington, eastern division. W. D. McFadden *et al.*, plaintiffs, *v.* The Mountain View Mining & Milling Co., defendant. Writ of error. Service of within writ by receipt of a true copy thereof ad-

mitted this 26th day of September, 1898. W. B. Heyburn,
125 attorney for defendant. Filed Sept. 26, 1898. A. Reeves Ayres, clerk. Stoll & Macdonald and Albert Allen, the Rookery, Spokane, Wash., attorneys for plaintiffs.

And afterwards, to wit, on the twenty-sixth day of September, 1898, there was duly issued out of said court a citation in the words and figures as follows, to wit:

Citation on Writ of Error.

UNITED STATES OF AMERICA, *ss*:

To the Mountain View Mining & Milling Company, Greeting:

You are hereby cited and admonished to be and appear at the United States circuit court of appeals for the ninth circuit, to be held at the city of San Francisco, in the State of California, within thirty days from the date of this writ, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the district of Washington, eastern division, wherein W. D. McFadden, David O'Neil, Charles W. Vedder and W. E. Harris are plaintiffs in error, and you are defendants in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected, and speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Melville W. Fuller, Chief Justice of the United States, and the seal of said circuit court, this 26th day
126 of Sept., in the year of our Lord one thousand eight hundred and ninety-eight, and of our Independence the one hundred and twenty-third.

C. H. HANFORD,

[SEAL.] *U. S. District Judge, Presiding in said Circuit Court.*

Attest: A. REEVES AYRES, *Clerk.*

(Endorsed:) In the United States circuit court of appeals, ninth circuit. W. D. McFadden *et al. vs.* The Mountain View Mining & Milling Co. Citation. Service of a copy of within citation admitted this twenty-sixth day of September, A. D. 1898. W. B. Heyburn, E. M. Heyburn, L. A. Doherty, attorneys for defendant. Filed Sept. 26, 1898, in the United States circuit court. A. Reeves Ayres, clerk, by James O'Neill, deputy.

UNITED STATES OF AMERICA, }
District of Washington, Eastern Division. }

Clerk's Certificate.

I, A. Reeves Ayres, clerk of the circuit court of the United States of America for the eastern division of the district of Washington in the ninth circuit, by virtue of the foregoing writ of error and in

obedience thereto, do hereby certify that the foregoing papers,
127 numbered from one to one hundred and sixteen, inclusive, contain a true and complete transcript of the record and proceedings had in said court in the case in which W. D. McFadden, David O'Neil, Charles W. Vedder and W. E. Harris are plaintiffs in error and The Mountain View Mining & Milling Company defendants in error, as the same remains of record and on file in said office.

In testimony whereof I have caused the seal of said court to be hereunto affixed at the city of Spokane in the eastern division of Washington, in the ninth circuit, this fifteenth day of October, in the year of our Lord one thousand eight hundred and ninety-eight, and of the Independence of the United States of America the one hundred and twenty-third.

A. REEVES AYRES, *Clerk*,
[SEAL.] By JAMES O'NEILL, *Deputy*.

And afterwards, to wit, on the twenty-sixth day of September, 1898, there was duly filed in said court in said cause a petition for an appeal and assignment of errors, in the words and figures following, to wit:

128 In the Circuit Court of the United States in and for the District of Washington, Eastern Division. In Equity.

W. D. McFADDEN, DAVID O'NEIL, CHARLES W. VEDDER, and W. E. Harris, Plaintiffs,
vs.
THE MOUNTAIN VIEW MINING & MILLING COMPANY (a Corporation), Defendant.

Petition for Appeal.

The above-named plaintiffs, conceiving themselves aggrieved by the decree made and entered on the twenty-third day of April, 1898, in the above-entitled case, do hereby appeal from said order and decree to the United States circuit court of appeals for the ninth circuit, for the reasons specified in the assignment of errors, which is filed herewith, and they pray that this appeal may be allowed and that a transcript of the record, proceedings, and papers upon which said decree was made, duly authenticated, may be sent to the United States circuit court of appeals for the ninth circuit.

Dated this twenty-sixth day of September, A. D. 1898.

STOLL & MACDONALD AND
ALBERT ALLEN,
Attorneys for Plaintiff.

129 The foregoing claim of appeal is allowed.
Dated September 26th, 1898.

C. H. HANFORD, *Judge*.

(Endorsed:) Original. No. —. In the circuit court of the United States, district of Washington, eastern division. In equity. W. D.

McFadden *et al.*, plaintiffs, *vs.* Mountain View Mining & Milling Company, defendant. Petition for appeal. Filed Sept. 26, 1896. A. Reeves Ayres, clerk. Stoll & McDonald and Albert Allen, the Rookery, Spokane, Wash., attorneys for plaintiffs.

In the Circuit Court of the United States in and for the District of Washington, Eastern Division. In Equity.

W. D. McFADDEN, DAVID O'NEIL, CHARLES W. VEDDER, and W. E. Harris, Plaintiffs and Appellants,
vs.
THE MOUNTAIN VIEW MINING & MILLING COMPANY (a Corporation), Defendant and Appellee.

Assignment of Errors on Appeal.

And now, on the twenty-sixth day of September, 1898, come the said plaintiffs, by Stoll & Macdonald and Albert Allen, their
130 solicitors, and say, that the decree in said cause is erroneous and against the just rights of said plaintiffs, for the following reasons:

I.

Because it appears from the stipulated facts in this cause that the location of the Mountain View mining claim made by Charles N. Collins on the sixteenth day of October, 1895, was made upon lands of the United States which at that time were not vacant public lands of the United States, and were not subject to the location of mineral claims under the provisions of the laws of the United States regulating the location of mining claims, and the court erred in concluding as a matter of law that the same were vacant lands.

II.

That the location of the Columbia, Kruger, Gray Eagle, and Exchequer Lode mining claims, made on Feb. 20, 1896, by the plaintiffs W. D. McFadden, David O'Neil, W. E. Harris, and one O. E. Cox, the grantor in interest of the plaintiff Charles W. Vedder, were made upon vacant and unoccupied mineral lands of the United States which were then and there vacant and subject to the location of mineral claims under the provisions of the laws of the United States regulating the location of mining claims.

III.

Because the stipulated facts show that the plaintiffs, on the twenty-sixth day of November, 1896, and within the sixty days' period of publication of defendant's notice for a patent, duly filed with
131 the register and receiver of the United States land office, at the city of Spokane, their protest and adverse claim against the application for the patent to the Mountain View mining claim of defendant, which protest and adverse claim was in strict compliance with law and the rules and regulations of the General Land Office, and the court erred in not so finding.

IV.

That it appears from the stipulated facts in this case that the plaintiffs are entitled to recover a decree against the defendant for the lands in controversy in this suit, and the refusal of the court to so find as a matter of law was error.

Wherefore, the said plaintiffs pray that the said decree be reversed and that the said court may be directed to enter a decree in accordance with the prayer of the appeal.

STOLL & MACDONALD AND
ALBERT ALLEN,
Solicitors for Plaintiffs.

(Endorsed:) Original. No. —. In the circuit court of the United States, district of Washington, eastern division. In equity. W. D. McFadden *et al.*, plaintiffs, *vs.* The Mountain View Mining & Milling Co., defendant. Assignment of errors on appeal. Filed Sept. 26, 1898. A. Reeves Ayres, clerk. Stoll & Macdonald, the Rookery, Spokane, Wash., attorneys for ——.

132 And afterwards, to wit, on the twenty-sixth day of April, 1898, there was duly filed in said court in said cause a bond on appeal in the words and figures following, to wit:

In the Circuit Court of the United States in and for the District of Washington, Eastern Division. In Equity.

W. D. McFADDEN, DAVID O'NEIL, CHARLES W. VEDDER, and W. E. Harris, Plaintiffs,
vs.
THE MOUNTAIN VIEW MINING & MILLING COMPANY (a Corporation), Defendant.

Bond on Appeal.

Know all men by these presents that we, W. D. McFadden, David O'Neil, Charles W. Vedder, and W. E. Harris, as principals, and Mary B. Rugh and S. S. Glidden, as sureties, are held and firmly bound unto the defendant, The Mountain View Mining & Milling Company in the full sum of two hundred and fifty ($250.00) dollars,
133 to be paid to the said defendan The Mountain View Mining & Milling Company, its certain attorneys, successors, or assigns, to which payment well and truly to be made we bind ourselves, our heirs, executors, and administrators, jointly and severally, firmly by these presents.

Sealed with our seals and dated this twenty-sixth day of September, in the year of our Lord one thousand eight hundred and ninety-eight.

Whereas, lately at a circuit court of the United States for the district of Washington, eastern division, in a suit depending in said court between the said W. D. McFadden, David O'Neil, Charles W. Vedder and W. E. Harris as plaintiffs, and The Mountain View

Mining & Milling Company, defendant, a judgment and decree was rendered against the said W. D. McFadden, David O'Neil, Charles W. Vedder and W. E. Harris, and the said W. D. McFadden, David O'Neil, Charles W. Vedder and W. E. Harris having appealed therefrom, and filed a copy thereof in the clerk's office of the said court, to reverse the decree in the aforesaid suit, and a citation directed to the said The Mountain View Mining & Milling Company citing and admonishing it to be and appear at a session of the United States circuit court of appeals for the ninth circuit, to be holden at Seattle in said circuit on the second Monday of September next:

Now, the condition of the above obligation is such that if the said W. D. McFadden, David O'Neil, Charles W. Vedder and W. E. Harris shall prosecute said appeal to effect and answer all
134 damages and costs, if they fail to make the said plea good, then the above obligation to be void, else to remain in full force and virtue.

W. D. McFADDEN,
By E. C. MACDONALD, *His Att'y.*
DAVID O'NEIL,
By E. C. MACDONALD, *His Att'y.*
CHARLES W. VEDDER,
By E. C. MACDONALD, *His Att'y.*
W. E. HARRIS,
By E. C. MACDONALD, *His Att'y.*
(X) MARY B. RUGH.
S. S. GLIDDEN.

STATE OF WASHINGTON, } ss:
County of Spokane, }

Mary B. Rugh and S. S. Glidden, being duly sworn, each for himself deposes and says that he is a resident of the city and county of Spokane, State of Washington; that he is worth the sum of five hundred dollars in separate property situated within the county of Spokane and State of Washington over and above all his debts and liabilities, and exclusive of property exempt from execution.

(X) MARY B. RUGH.
S. S. GLIDDEN.

Subscribed and sworn to before me this twenty-sixth day of September, 1898.

SAM'L R. STERN,
Notary Public in and for the State of Washington, Residing at Spokane.
[SEAL.]

135 This bond is hereby approved this twenty-sixth day of September, 1898.

C. H. HANFORD, *Judge.*

(Endorsed:) Original. No. —. In the circuit court of the United States, district of Washington, eastern division. In equity. W. D. McFadden *et al.*, plaintiffs, *vs.* Mountain View Mining & Milling

Company, defendant. Bond on appeal. Filed Sept. 26, 1898. A. Reeves Ayres, clerk. Stoll & Macdonald and Albert Allen, the Rookery, Spokane, Wash., attorneys for plaintiffs.

And afterwards, to wit, on the twenty-sixth day of September, 1898, there was duly issued out of said court a citation in the words and figures as follows, to wit:

Citation on Appeal.

UNITED STATES OF AMERICA, *ss:*

To the Mountain View Mining & Milling Company, Greeting:

You are hereby cited and admonished to be and appear at the United States circuit court of appeals for the ninth circuit, to be held at the city of San Francisco, in the State of California, within thirty days from the date of this writ, pursuant to an appeal filed in the clerk's office of the circuit court of the United States for the district of Washington, eastern division, wherein W. D. McFadden, David O'Neil, Charles W. Vedder and W. E. Harris are
136 appellants and you are defendants in error, to show cause, if any there be, why the decree in the said appeal mentioned should not be corrected, and speedy justice should not be done to the parties in that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, and the seal of said circuit court, this 26th day of September, in the year of our Lord one thousand eight hundred and ninety-eight, and of our Independence the one hundred and twenty-third.

C. H. HANFORD,
U. S. District Judge, Presiding in said Circuit Court.

[SEAL.]

Attest: A. REEVES AYRES,
Clerk U. S. Circuit Court.

(Endorsed:) In the United States circuit court of appeals, ninth circuit. W. D. McFadden *et al. vs.* The Mountain View Mining & Milling Co. Citation. Service of a copy of within citation admitted this 26th day of September, A. D. 1898. W. B. Heyburn, E. M. Heyburn, L. A. Doherty, attorneys for defendant. Filed Sept. 26, 1898, in the United States circuit court. A. Reeves Ayres, clerk, by James O'Neill, deputy.

137 UNITED STATES OF AMERICA, }
District of Washington, Eastern Division. }

Clerk's Certificate.

I, A. Reeves Ayres, clerk of the circuit court of the United States of America for the eastern division of the district of Washington, in the ninth circuit, by virtue of the foregoing appeal and in obedience thereto, do hereby certify that the foregoing pages, numbered

from one to one hundred and twenty-six, inclusive, contain a true and complete transcript of the record and proceedings had in said court in the case of W. D. McFadden, David O'Neil, Charles W. Vedder and W. E. Harris as plaintiffs in error and The Mountain View Mining & Milling Company, defendants in error, as the same remain of record and on file in said office.

In testimony whereof I have caused the seal of said court to be hereunto affixed at the city of Spokane, in the eastern division of Washington, in the ninth circuit, this fifteenth day of October, in the year of our Lord one thousand eight hundred and ninety-eight, and of the Independence of the United States of America the one hundred and twenty-third.

A. REEVES AYRES, *Clerk*,
[SEAL.] By JAMES O'NEILL, *Deputy*.

I hereby certify that the cost of the above record is $38.00, and that same was paid by Messrs. Stoll and Macdonald.

A. REEVES AYRES, *Clerk*,
[SEAL.] By JAMES O'NEILL, *Deputy*.

138 (Endorsed:) No. 482. In the United States circuit court of appeals for the ninth circuit. W. D. McFadden, David O'Neil, Charles W. Vedder, and W. E. Harris, plaintiffs in error and appellants, *vs.* Mountain View Mining & Milling Company, defendant in error and appellee. In error to and appeal from the United States circuit court for the district of Washington, eastern division. Transcript of record. Filed Oct. 21, 1898. F. D. Monckton, clerk.

139 At a stated term, to wit, the October term, A. D. 1898, of the United States circuit court of appeals for the ninth circuit, held at the court-room, in the city and county of San Francisco, on Wednesday, the fifteenth day of February, in the year of our Lord one thousand eight hundred and ninety-nine.

Present: The Honorable William B. Gilbert, circuit judge; Honorable Erskine M. Ross, circuit judge; Honorable William W. Morrow, circuit judge.

W. D. McFADDEN ET AL.
v.
THE MOUNTAIN VIEW MINING & MILLING COMPANY. } No. 482.

By stipulation of counsel, ordered cause and motion to dismiss submitted to the court for consideration and decision on briefs on file.

140 In the United States Circuit Court of Appeals for the Ninth Circuit.

W. D. McFADDEN, Plaintiff in Error and Appellant,
vs.
MOUNTAIN VIEW MINING & MILLING COMPANY, Defendant in Error and Appellee.

No. 482. Filed Sept. 11, 1899.

In error to and appeal from the United States circuit court for the district of Washington, eastern division.

Before Gilbert, Ross, and Morrow, circuit judges.

Opinion.

Ross, circuit judge, delivered the opinion of the court:

This action was commenced in the superior court of the State of Washington for the county of Stevens, for the purpose of securing an adjudication by a court of competent jurisdiction of the adverse claims of the parties to certain mining ground, under and by virtue of the provisions of section 2326 of the Revised Statutes of the United States—the plaintiff in the action claiming under locations thereof made on the 20th day of February, 1896, and the defendant under a location, as the "Mountain View" claim, made on the 16th day of October, 1895.

141 On motion of the defendant, the action was removed into the circuit court of the United States for the district of Washington, eastern division. In that court the respective parties entered into written stipulations, waiving a jury and submitting the case to the court upon an agreed statement of facts, which in express terms eliminated every question from the consideration of the court, except one, viz: whether or not at the time of the location of the Mountain View claim, or at any time prior to the 20th day of February, 1896, that portion of the Colville Indian reservation within which the ground in question is situated, was open to the location of mining claims.

In the court below judgment was given for the defendant to the action.

That court having treated the case as an action at law, the plaintiff in the suit, out of an abundance of caution, not only appealed from the judgment, but also sued out a writ of error. This fact constitutes one of the grounds of the motion made on behalf of the defendant to the suit to dismiss both the appeal and the writ of error.

The other ground of the motion is, that in and by the citations appearing in the record, the appellee and defendant in error is cited to appear, within thirty days from the date of the issuance of the writs, in this court at the city of San Francisco, California, instead of at the city of Seattle, in the State of Washington.

There is no merit in either of these grounds. The latter ground of the motion to dismiss is based upon the third subdivision of rule

36 of this court, providing for the holding of a term of the court in the city of Seattle, in the State of Washington, beginning on the second Monday in September, and also a term each year at the city of Portland, in the State of Oregon, beginning on the third Monday in September, and providing, also, that "all appeals and writs of error from the circuit and district courts for the district of
142 Washington shall be heard at said annual term in the city of Seattle, unless it is stipulated by the parties thereto that they be heard at San Francisco."

The citations were issued on the 26th day of September, 1898, and as no term of the court would be held in Seattle until about one year thereafter, they were made returnable at the city of San Francisco, at which place the next term of the court, after the return day of the writs, would be held.

In view of these facts it may well be doubted whether the citations were not properly made returnable at the city of San Francisco. On the return day of the writs the court was to be in session at that place, and under the rules of the court the parties were permitted to stipulate for the cause being heard there. The defect, if defect at all, was a mere irregularity, which might be and which was in this case, waived by the moving party; for the record shows that not only did its counsel acknowledge service of a copy of each of the citations, and due service of the brief of the plaintiffs in error and appellants, [illegible]ut objection, but on the 12th day of November, 1898, entered into a stipulation in writing with the counsel for the plaintiffs in error and appellants, to the effect that the cause be heard at San Francisco at the then next session of the court, instead of at the city of Seattle.

The office of the citation is to give notice to the opposite party of the removal of the cause to the appellate court.

The Supreme Court in Bigler *v.* Waller, 12 Wall., 142, said: "Notice is required by law, and where none is given, and the failure to comply with the requirement is not waived, the appeal or writ of error must be dismissed, but the defect may be waived in various ways, as, by the consent or appearance or the fraud of the other party. Service of the citation may be made upon the attorney of record of the proper party. Bacon *et al. v.* Hart, 1 Black, 38. Unquestionably, the attorney of record may also waive service, and acknowledge notice on the citation, and in that behalf he
143 represents the party. Grosvenor *v.* Danforth, 16 Mass., 74; Adams *v.* Robison, 1 Pick., 461." Referring to the facts in that case, the court continued: "On the citation in this case is the following endorsement: 'I hereby acknowledge service of the within citation. James Alfred Jones, counsel for defendants in this case in the circuit court of the United States of the district of Virginia.' Viewed in any reasonable light, it seems to the court that the attorney knew that the appeal was allowed by the court, and was prosecuted by the appellant, which is the only purpose intended to be effected by the citation. Having been counsel in the case, the party signing that certificate must have known that the suit had been revived, and that proceeding took place before the final decree was

entered. Such a service would be sufficient beyond all doubt, if there had been no error in the form of the citation, and as that objection is a merely formal one, we are all of the opinion that it must be considered as waived by the circumstantial language of the certificate signed without objection by the attorney of record in the circuit court."

To the same effect is Tripp *v.* Santa Rosa Street Railroad, 144 U. S., 126, 129; Villabolas *v.* United States, 6 How., 81, 90; Goodwin *v.* Fox, 120 U. S., 775.

As there have been conflicting decisions of the courts in respect to the character of the action brought in the court below by the plaintiffs in error and appellants, they, out of abundant caution and to guard against a possible chance of dismissal, brought the case here both by appeal and by writ of error. There was, however, but one action in the court below, and but one cause and one record here. The method pursued was the safe one, and has the sanction of the Supreme Court. Hurst *v.* Hollingsworth, 94 U. S., 111; *idem*, 100 U. S., 100; Plymouth Mining Co. *v.* Amador Canal Co., 118 U. S., 264, 269.

As the record, however, shows that the action was brought under and by virtue of the provisions of section 2326 of the Revised
144 Statutes, for the adjudication of a contest originating in the Land Office of the United States, the same question of jurisdiction that was determined by this court in the case of Shoshone Mining Company *v.* Rutter, 87 Fed., 801, is presented. In that case this court, after full consideration, held, in accordance with the rulings of several of the circuit courts of this circuit, as well as of others, that of such an action, where, as here, the alleged value of the property in controversy is sufficient to answer the statutory requirement in that regard, the Federal courts have full jurisdiction, and, furthermore, that such an action is of an equitable nature. We adhere to that decision, and deny the motions to dismiss.

The merits of the case are, by the agreement of the respective parties, made to turn upon the question whether or not the ground in controversy was subject to location as a mining claim or claims on the 16th day of October, 1895, when it was located as the Mountain View mineral claim by the grantor of the appellees. If the ground was then subject to such location, it is agreed by the respective parties that the judgment of the court below should be affirmed, since it is stipulated that the location under which the appellee claims was made in compliance with the law, if the ground was then subject to be located under the mining laws. If it was not so subject, it is conceded by the respective parties that the judgment of the court below must be reversed, as it is further agreed that, in that event, the locations under which the appellants claim are valid.

By the act of July 4, 1866 (14 Stat., 86), and subsequent acts, Congress provided, among other things, that in all cases lands valuable for minerals shall be reserved from sale, except as otherwise directed by law, and further declared that all valuable mineral deposits in lands belonging to the United States, both surveyed and

unsurveyed, are free and open to exploration and purchase, and the lands in which they are found to occupation and pur-
145 chase by citizens of the United States, and those who have declared their intention to become such, under regulations prescribed by law, and according to the local customs or rules of miners in the several mining districts, so far as the same are applicable and not inconsistent with the laws of the United States. Revised Statutes, secs. 2318, 2319.

On the 9th day of April, 1872, an executive order was issued by President Grant, by which was set apart as a reservation for certain specified Indians, and for such other Indians as the Department of the Interior should see fit to locate thereon, a certain scope of country "bounded on the east and south by the Columbia river, on the west by the Okanagon river, and on the north by the British possessions," thereafter known as the Colville Indian reservation.

There can be no doubt of the power of the President to reserve those lands of the United States for the use of the Indians. The effect of that executive order was the same as would have been a treaty with the Indians for the same purpose, and was to exclude all intrusion upon the territory thus reserved by any and every person, other than the Indians for whose benefit the reservation was made, for mining as well as other purposes. Kendall *v.* San Juan Silver Mining Co., 144 U. S., 658, 663.

That reservation stood unrevoked for many years, and it is not pretended that during that time anybody had any right to locate thereon any mining claim, or otherwise acquire any right to any portion thereof from the Government.

On the 19th day of August, 1890, Congress, by an act of that date (26 Stat., 355), authorized the President to appoint a commission composed of three persons, to visit the Colville Indian reservation and negotiate with the Indians for the cession of such portion thereof as they might be willing to dispose of, and directing the commission to report to the Secretary of the Interior, and that officer to report the facts to Congress. In pursuance of that
146 act, the President appointed a commission consisting of three persons, to carry on the proposed negotiations, which commission made its report to the Secretary of the Interior on June 8, 1891, which was transmitted to Congress by the President in a message of date June 6, 1892. The report contains, among other things, this statement:

"That of the portion of the territory ceded, it is estimated that about three hundred thousand acres are suitable for agricultural purposes. The remainder is very valuable for grazing purposes and for the timber thereon. Much of the territory ceded is mountainous, and abounds in rich mineral deposits. The southern portion of said reservation, it being the portion of said reservation not ceded, contains the largest proportion of agricultural lands, and the grazing lands upon this portion are for the most part fine. The supply of timber here is quite ample. From the best information the commission has been able to obtain, it is believed that there is upon the portion of said reservation not ceded, an acreage of land

suitable for agricultural purposes very largely in excess of a hundred and sixty thousand acres, the limitation indicated in department instructions dated October 21, 1891. The commission did not deem it advisable to negotiate with the Indians for the purchase of any greater area of territory than that ceded, and are satisfied that the portion of said reservation not ceded contains ample territory for the comfort, security, support and maintenance of all the Indians upon said reservation in their various avocations of life. From the best information the commission could obtain without incurring the expense of a survey—and this was not practicable owing to the scarcity of funds—there remains of the portion of the Colville reservation not ceded near one million three hundred thousand acres."

The commission negotiated a treaty with the Indians providing for the extinguishment of all of their rights and claims in and to the north half of the reservation in question, which treaty was to become effective upon its approval by Congress. The treaty was submitted to Congress, and also a proposed bill for enactment to carry the treaty into effect. The message, with the report of
147 the commission and agreement, was by the House of Representatives referred to its Committee on Indian Affairs, which reported that the necessity for opening at least a portion of the reservation existed, for these, among other, reasons:

"A lessening of the dimensions of the Colville reservation, the planting of active, prosperous, and well-ordered white communities on every side of the Indians, the building of railroads, the creation of towns and cities, the opening of mines, and the consequent establishment of markets near at hand, etc. Further that the reservation is surrounded on two sides by the Columbia river, on one side by the wilds of British Columbia, and on the other by a portion of Washington that has no outlet by rail, because the reservation itself stands as a barrier to all railroad construction from the east. And as a third reason why the reservation should be opened, that the reservation as it stands today is a great obstacle to the development of the State of Washington and the general progress of the Pacific Northwest. So long as it continues to be the sporting ground of so sparse, thriftless, and irresponsible a population, its lands will remain untilled, and its mines will remain unopened, being more than the Indians need for sustenance and comfort, yielding no revenue to the General Government, and being of no taxable value to the State of which it is an inseparable and essential part. It cuts off communication between the eastern and western portion of the State, and blocks the way to railroads that stand waiting at its boundaries. A railroad company, a local corporation, has constructed a line from the city of Spokane, the metropolis of eastern Washington, to Marcus, a point on the Columbia river, 100 miles distant, at an expense of over two million dollars, and has surveyed an extension through the reservation to the Okanagon country, an extensive region between the Colville reservation and the Cascade mountains, rich in mineral and agricultural products, but wholly without railroad transportation, etc."

The bill upon which this report was made was entitled "An act

to ratify and confirm an agreement with the Indians residing on the Colville reservation, in the State of Washington, with certain modifications and making appropriation for carrying into
148 effect the same." This was House bill No. 7557, introduced in the House and referred to the Committee of the Whole on April 9, 1892.

The bill to carry into effect the proposed treaty with the Indians was not enacted, but Congress did enact, on the 1st day of July, 1892, an act, the proper construction of which must control the disposition of the present case. That act is entitled "An act to provide for the opening of a part of the Colville reservation in the State of Washington, and for other purposes," and by its first section provides:

"That subject to the reservations and allotment of lands in severalty to the individual members of the Indians of the Colville reservation in the State of Washington herein provided for, all the following-described tract or portion of said Colville reservation, namely: Beginning at a point on the eastern boundary line of the Colville Indian reservation where the township line between townships thirty-four and thirty-five north, of range thirty-seven east, of the Willamette meridian, if extended west, would intersect the same, said point being in the middle of the channel of the Columbia river, and running thence west parallel with the forty-ninth parallel of latitude to the western boundary line of the said Colville Indian reservation in the Okanagon river, thence north following the said western boundary line to the said forty-ninth parallel of latitude, thence east along the said forty-ninth parallel of latitude to the northeast corner of the said Colville Indian reservation, thence south following the eastern boundary of said reservation to the place of beginning, containing by estimation one million five hundred thousand acres, the same being a portion of the Colville Indian reservation created by executive order dated July second, eighteen hundred and seventy-two, be, and is hereby, vacated and restored to the public domain, notwithstanding any executive order or other proceeding whereby the same was set apart as a reservation for any Indians or bands of Indians, and the same shall be open to settlement and entry by the proclamation of the President of the
149 United States, and shall be disposed of under the general laws applicable to the disposition of public lands in the State of Washington." (27 Stat., 62.)

Section 2 of this act provides for the disposition of the lands to be so opened to settlement, entry, and disposition.

By section 3 it is provided that each entryman under the homestead laws shall, within five years from the date of his original entry, before receiving a final certificate of the land covered by his entry, pay to the United States for the land so taken by him, in addition to the fees provided by law, the sum of one dollar and fifty cents per acre, one-third of which shall be paid within two years after the date of the original entry; but that the rights of honorably discharged Union soldiers and sailors, as defined in certain

specified sections of the Revised Statutes, shall not be abridged except as to the sum to be paid as aforesaid.

Section 4 is as follows:

"That each and every Indian now residing upon the portion of the Colville Indian reservation hereby vacated and restored to the public domain, and who is so entitled to reside thereon, shall be entitled to select from said vacated portion eighty acres of land, which shall be allotted to each Indian in severalty. No restrictions as to locality shall be placed upon such selections other than that they shall be so located as to conform to the congressional survey or subdivisions of said tract or country, and any Indian having improvements may have the preference over any other person in and to the tract of land containing such improvements, so far as they are within a legal subdivision not exceeding in area the quantity of land that he or she may be entitled to select and locate. All such allotments shall be made at the cost of the United States, under such rules and regulations as the Secretary of the Interior may from time to time prescribe. Such selections shall be made within six months after the date of the President's proclamation opening the lands hereby vacated to settlement and entry, and after the same have been surveyed, and when such allotments have been selected as
150 aforesaid and approved by the Secretary of the Interior, the titles thereto shall be held in trust for the benefit of the allottees respectively, and afterwards conveyed in fee-simple to the allottees, or their heirs, as provided in the act of Congress entitled 'An act to provide for the allotment of land in severalty to Indians on the various reservations, and to extend the protection of the laws of the United States and Territories over the Indians, and for other purposes,' approved February eighth, eighteen hundred and eighty-seven, and an act in amendment and extension thereof, approved February twenty-eight, eighteen hundred and ninety-one, entitled 'An act to amend and further extend the benefits of the act approved February eighth, eighteen hundred and eighty-seven, entitled "An act to provide for the allotment of land in severalty to Indians on the various reservations, and to extend the protection of the laws of the United States over the Indians, and for other purposes:"' Provided, that such allotted lands shall be subject to the laws of eminent domain of the State of Washington, and shall, when conveyed in fee-simple to the allottees or their heirs, be subject to taxation as other property in said State."

By section 5 it is provided that all Indians residing on the lands by the act vacated and restored, shall have the right, if they so prefer, under the direction of the Indian agent, to occupy and reside upon such portions of the Colville Indian reservation not by the act vacated, as are not occupied by or in the possession of any other Indian or Indians.

Section 6 of the act makes provisions for land for school purposes, and also for a site for certain mills, and, after making an appropriation for the purpose of carrying out the provisions of the act, it concludes by declaring in section 8 that nothing contained in the

act shall be considered as recognizing title or ownership by the Indians of any part of the reservation whether restored to the public domain, or still reserved by the Government for their use and occupancy.

On the 20th day of February, 1896, Congress passed an act entitled "An act to extend the mineral land laws of the United
151 States to lands embraced in the north half of the Colville Indian reservation," by which it is declared "that the mineral land laws of the United States be, and are hereby, extended so as to apply to all lands" described in section 1 of the above act of July 1, 1892. (29 Stat., 10.)

On the 6th day of March, 1896, Congress passed an act entitled "An act granting to the Columbia and Red Mountain Railway Company a right of way through the Colville Indian reservation, in the State of Washington, and for other purposes," and providing "that there be, and is hereby, granted to the Columbia and Red Mountain Railway Company, a corporation organized under the laws of the State of Washington, a right of way to the extent of one hundred feet on each side of the center line of said railway across the Colville Indian reservation in the State of Washington, commencing at a point at or near the Little Dalles on the Columbia river, in Stevens county in said State, and running thence in a northerly direction by the most feasible route to the international boundary line between the United States and British Columbia, together with all the rights granted to railroads by the act of Congress entitled 'An act granting to railroads a right of way through the public lands of the United States,' approved March third, eighteen hundred and seventy-five; and for the purposes of this grant, and the construction of said railway, all the provisions of said act are hereby declared to be applicable thereto to the same extent as though the lands in said reservation were open to settlement and sale." (29 Stat., 44.)

The question in the case is whether or not the act of July 1, 1892, in and of itself, operated to restore that portion of the Colville Indian reservation described in its first section, to the mass of public lands so as to admit of the immediate entry thereon by the public and the location of mining claims upon it under the mining laws
of the United States; for it cannot be doubted that if one
152 man was thereby given the right of entry thereon for the purpose of prospecting and locating mining claims, every citizen of the United States, and every person who had declared his intention to become such, was thereby given the same right.

It is undisputed that the officers of the Land Department have uniformly held that the act did not have that effect. Indeed, the Secretary of the Interior, when advised that many persons had gone upon that portion of the reservation for the purpose of making mining locations and entries issued, by direction of the President, a warning to such persons, prohibiting them from going upon the reservation for any purpose in advance of the issuance of the proclamation by the President provided for by the act.

It is said in support of the judgment given below, that where the

words of an act of Congress are plain, and their meaning is clear, they must prevail, notwithstanding they have been otherwise construed by the officers charged with the execution of the law. That is perfectly true; but at the same time the rule is firmly established that the contemporaneous construction of a statute by those charged with its execution, especially when it has long prevailed, is entitled to great weight, and should not be disregarded or overthrown except for cogent reasons, and unless it be clear that such construction is erroneous. United States *v.* Johnston, 124 U. S., 236, 253; Edwards *v.* Darby, 12 Wheat., 206; United States *v.* Moore, 95 U. S., 760; Hahn *v.* United States, 107 U. S., 402; United States *v.* Philbrick, 120 U. S., 52, 59; Cooper Mfg. Co. *v.* Ferguson, 113 U. S., 727.

Moreover, the legislative construction of its own act is always potent. "If it can be gathered," said the Supreme Court in The United States *v.* Freeman, 44 U. S., 556, 564, "from a subsequent statute *in pari materia*, what meaning the legislature attached to the words of a former statute, they will amount to a legisla-
153 tive declaration of its meaning, and will govern the construction of the first statute." And in the case of the Philadelphia, etc., R. R. Co. *v.* Catawessa R. R. Co., 53 Pa. St., 20, the supreme court of Pennsylvania said: "If a contemporaneous construction by the legislature of the same words can be discovered it is high evidence of the sense intended." That the acts of July 1, 1892, and February 20, 1896, are *in pari materia*, is perfectly plain, for they relate to the same subject-matter, and are parts of the same legislative purpose. In respect to such statutes, Sutherland on Statutory Construction, section 283, says: "All consistent statutes which can stand together, though enacted at different dates, relating to the same subject, and hence briefly called statutes *in pari materia*, are treated prospectively and construed together as though they constituted one act. This is true whether the acts relating to the same subject were passed at different dates, separated by long or short intervals at the same session, or on the same day. They are all to be compared, harmonized, if possible, and if not susceptible to a construction which will make all of their provisions harmonize, they are made to operate together so far as possible consistently with the evident intent of the latest enactment." And in Endlich on the Interpretation of Statutes, at section 43, it is said: "Where there are earlier acts relating to the same subject, the survey must extend to them; for all are, for the purposes of construction, considered as forming one homogen-ous and consistent body of law, and each of which may explain and elucidate every other part of the common system to which it belongs."

That Congress did not intend, by the act of July 1, 1892, to open the portion of the Colville Indian reservation thereby restored to the public domain, to the operation of the mineral laws of the United States in advance of, and without reference to, the proclamation of the President therein provided for, is, we think, quite clearly shown by its act of February 20, 1896, in which, as has been
154 seen, it declared "that the mineral land laws of the United States be, and are hereby, extended so as to apply to all

lands," described in section 1 of the act of July 1, 1892. If, by the act of July 1, 1892, Congress had already brought those lands within the operation of the mineral land laws, there was obviously no need of the act of February 20, 1896, providing, as it did, for precisely the same thing. Idle acts cannot be justly or properly attributed to Congress. To the suggestion that the officers of the Land Department of the Government had uniformly held that the act of July 1, 1892, did not open the portion of the reservation restored to the public domain, to the operation of the mineral laws in advance of the President's proclamation, and that for that reason Congress passed the act of February 20, 1896, the answer is, that there is in the language of the latter act no indication whatever of any intention on the part of Congress to correct the interpretation that had been put by the officers of the Land Department upon its previous act of July 1, 1892. If such had been the intention it could very easily have been expressed, and some expression indicating the intention would very naturally be expected. On the contrary, the language of the act of 1896 is "That the mineral land laws of the United States be, and are hereby, extended so as to apply" to the lands restored to the public domain by the act of July 1, 1892. The words of the act of 1896 that there "be and are hereby extended," etc., are words of present and future operation, and do not manifest any intent on the part of Congress to give to the act in which they appear a retrospective effect, but do clearly indicate that Congress did not consider that the lands in question were already within the operation of the mining laws. Retrospective effect is never given to a law unless the language used, properly construed, plainly manifests such intention. Endlich on Interpretation of Statutes, secs. 291–'4; Potter's Dwarris on Statutes and Constitutions, note pp. 60 and 70. See also United States *v.* Southern Pacific Railroad
155 Company, 146 U. S., 570; St. Paul & Pacific Railroad *v.* Northern Pacific Railroad Co., 139 U. S., 1; Schulenberg *v.* Harrisman, 21 Wall., 44.

Recurring to the act of July 1, 1892, we see no good reason to doubt that it was properly construed by the officers of the Land Department, and by Congress itself, as manifested by its act of February 20, 1896. It is true that by the first section of the act of July 1, 1892, that portion of the Colville Indian reservation therein described was, with certain limitations and exceptions, restored to the public domain; but it must be remembered that all of the public domain is not subject to entry or disposal under the mining or other general laws of the United States. Alaska became a part of the public domain of the United States upon its cession by the Emperor of Russia; but it was not until July 27, 1868, that the laws of the United States relating to customs, commerce and navigation were extended to and over that portion of the public domain (15 Stat., 240), and not until March 17, 1884, that the laws of the United States relating to mining claims, and the rights incident thereto, were made applicable thereto, and then, only subject to certain conditions and provisions prescribed by Congress (23 Stat., 24). Later, a further extension of the general land laws of the United States

were made to Alaska (act of March 3, 1891, 26 Stat., 1095). The public lands of Hawaii, Porto Rico, and other recently acquired territory now constitute a part of the public domain of the United States; but to none of these has Congress yet extended the mining or any of the other general land laws of the United States. All of this is the province, and the exclusive province, of the legislative department of the Government. It does not, therefore, necessarily follow, from the mere fact that certain territory constitutes a part of the public domain, that the mining laws of the United States apply thereto. They do if Congress has so provided, but they do not unless Congress has so provided.

156 Again recurring to the act of July 1, 1892, it is seen that the portion of the Colville Indian reservation thereby restored to the public domain was expressly made subject to the reservations and allotments of lands in severalty to the individual members of the Colville tribe provided for in the act, and the restoration was also accompanied with the express statutory declaration that the portion restored "shall be opened to settlement and entry by the proclamation of the President of the United States, and shall be disposed of under the general laws applicable to the disposition of public lands in the State of Washington."

From these provisions it is plain, we think, that the "opening" to be effected by the President's proclamation, was as broad as the "disposition" provided for by the same section and clause; that is to say, that the lands authorized by the act to be disposed of under the general laws applicable to the disposition of the public lands were the same lands, and none other, that the President was, by his proclamation, authorized to open to settlement and entry. The general laws applicable to the disposition of the public lands embrace those relating to mining claims, as well as those relating to pre-emption, homestead, and other entries. "The words 'public lands,'" said the Supreme Court in Newhall *v.* Sanger, 92 U. S., 763, "are habitually used in our legislation to describe such as are subject to sale or other disposal under general laws." See, also, Barton *v.* Northern Pacific Railroad Co., 145 U. S., 535; Mann *v.* Tacoma Land Co., 153 U. S., 73; Doolan *v.* Carr, 125 U. S., 618.

While it is true that the right to mineral lands is initiated by location, after the proper discovery of mineral thereon, and that such claims may be held and worked without purchase, yet the law authorizing their exploration also provides for their location, entry, and purchase. (Rev. Stat., secs. 2319–2350.) It necessarily follows

157 that any of the lands of the United States that are, by its general laws, open to exploration for minerals, are likewise open to location, entry, and purchase as such, if they be mineral in character and mineral be discovered therein. Hence it cannot be true, we think, that the portion of the Colville reservation restored to the public domain by the act of July 1, 1892, was any more open to the public in the exploration of minerals and the location of mining claims thereon, in advance of the proclamation of the President therein provided for, than it was to any other kind of entry, or settlement, or disposition. Such exploration, if generally carried on,

might, and very probably would, have resulted in numerous locations, very likely interfering with the allotments to the Indians provided for by the act, and subject to which the restoration was made; to avoid which conflicts was one of the purposes of the provision authorizing the President to provide by proclamation for the opening to settlement, entry, and disposition of the land restored by the act to the public domain. That provision was in harmony with the policy theretofore adopted by Congress in the opening of large bodies of land to disposition under the general laws of the United States, such as the opening of Oklahoma, and the Cherokee strip, whereby a certain date in the future was authorized to be fixed for the opening, and all persons thereby put upon an equal footing. This, we think, was the clear intent of the act of July 1, 1892, as shown by its own provisions. That it was so understood and construed by the officers of the Land Department of the Government is conceded, and that it is the interpretation that Congress itself put upon the act has been shown by its subsequent act of February 20, 1896, and is further shown by its passage of the act of March 6, 1896, by which it granted to the Columbia and Red Mountain Railway Company a right of way one hundred feet in width over the portion of the reservation in question described in section 1 of the act of July 1, 1892, which would have been an entirely useless piece of legislation if that land had been by that act, irrespective
158 of the proclamation of the President, restored to the mass of public lands for all purposes except pre-emption, settlement, homestead, and other like entries; for, in respect to the public lands subject to disposal under general laws, the act of March 3d, 1875, entitled "An act granting railroads a right of way over the public lands of the United States," applies, and there was no need of any other law for that purpose.

The judgment is reversed, and the cause remanded to the court below for further proceedings in conformity with this opinion.

(Endorsed:) Filed September 11, 1899. F. D. Monckton, clerk.

Dissenting Opinion.

GILBERT, *Circuit Judge*, dissenting:

I am of the opinion that the circuit court had no jurisdiction of this cause, for the reasons which were expressed in the dissenting opinion in the case of Shoshone Mining Company v. Rutter *et al.*, 87 Fed., 801.

(Endorsed:) Dissenting opinion. Filed October 23, 1899. F. D. Monckton, clerk.

159 United States Circuit Court of Appeals for the Ninth Circuit, October Term, 1898.

W. D. McFADDEN, DAVID O'NEILL, CHARLES W. VEDDER, and W. E. Harris, Plaintiffs in Error and Appellants,
vs.
MOUNTAIN VIEW MINING AND MILLING COMPANY, Defendant in Error and Appellee. } No. 482.

In error to and appeal from the circuit court of the United States for the district of Washington, eastern division.

This cause came on to be heard on the transcript of the record from the circuit court of the United States for the district of Washington, eastern division, and was argued by counsel.

On consideration whereof it is now here ordered and adjudged by this court that the judgment of the said circuit court in this cause be, and the same is hereby, reversed, with costs, and the cause is remanded to said circuit court for further proceedings in conformity with the opinion of this court.

(Endorsed:) Judgment. Filed September 11, 1899. F. D. Monckton, clerk.

160 In the United States Circuit Court of Appeals for the Ninth Circuit.

MOUNTAIN VIEW MINING & MILLING COMPANY, a Corporation, Appellant,
vs.
W. D. McFADDEN, DAVID O'NEIL, CHARLES W. VEDDER, and W. E. Harris, Appellees. } No. 482.

Petition for Appeal.

The above-named appellant, The Mountain View Mining and Milling Company, conceiving itself aggrieved by the decree made and entered on the 11th day of September, 1899, in the above-entitled cause, does hereby appeal from said decree to the Supreme Court of the United States for the reasons specified in the assignments of error, which is filed herewith, and prays that this appeal may be allowed, and that a transcript of the record and proceedings and papers upon which said decree was made, duly authenticated, may be sent to the Supreme Court of the United States.

W. B. HEYBURN,
Solicitor for Appellant.

Dated this 7th day of October, A. D. 1899.

The foregoing claim of appeal is allowed.

WILLIAM B. GILBERT,
United States Circuit Judge.

Dated this 7th day of October, A. D. 1899.

(Endorsed:) Petition for appeal to Supreme Court U. S. and order allowing same. Filed Oct. 16, 1899. Frank D. Monckton, clerk, by Meredith Sawyer, deputy clerk.

161 In the United States Circuit Court of Appeals in and for the Ninth Circuit.

MOUNTAIN VIEW MINING AND MILLING COMPANY, a Corporation, Appellant,
vs.
W. D. MCFADDEN, DAVID O'NEIL, CHARLES W. VEDDER, and W. E. Harris, Appellees.
No. 482.

Assignments of Error.

Now, on this 7th day of October, A. D. 1899, comes the appellant, The Mountain View Mining and Milling Company, by W. B. Heyburn, its solicitor, and says that the decree in said cause is erroneous and against the just rights of appellant for the following reasons:

I.

That it appears upon the face of the bill that the plaintiffs have an adequate remedy at law.

II.

That the said plaintiffs have not in and by said bill made or stated such a cause as doth or ought to entitle them to any such discovery or relief as is thereby sought or prayed for from or against the defendant.

III.

Because it doth not appear that the action is one arising under the Constitution or laws of the United States.

V.

The decision of the United States circuit court of appeals for the ninth circuit, wherein it holds that the land and premises located and claimed as the Mountain View mining claim was not
162 open to location as a mining claim prior to the 20th day of February, A. D. 1896, and at the time of the location of the said Mountain View mining claim.

VI.

The judgment of the said circuit court of appeals that the location of the Mountain View mining claim was invalid by reason of the fact that the land and premises were within an Indian reservation and not subject to location at the time the same was made by the defendant.

Wherefore appellant prays that said decree be reversed, and that the court may be directed to enter a decree for the appellant.

W. B. HEYBURN,
Solicitor for Appellant.

(Endorsed:) Assignment of errors. Filed October 17th, 1899, *nunc pro tunc* as of October 7, 1899, by order of court. F. D. Monckton, clerk.

163 In the United States Circuit Court of Appeals in and for the Ninth Circuit.

MOUNTAIN VIEW MINING AND MILLING COMPANY, a Corporation, Appellant,
vs.
W. D. McFADDEN, DAVID O'NEIL, CHARLES W. VEDDER, and W. E. Harris, Appellees.
No. 482.

Know all men by these presents that we, The Mountain View Mining and Milling Company, as principal, and The American Surety Company of New York, as sure*ties*, are held *are* firmly bound unto W. D. McFadden, David O'Neil, Charles W. Vedder, and W. E. Harris in the full sum of five hundred dollars, to be paid to the said W. D. McFadden, David O'Neil, Charles W. Vedder, and W. E. Harris, their certain attorneys, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 3rd day of October, A. D. 1899.

Whereas lately, at a United States circuit court of appeals for the ninth circuit, in a suit, depending in said court, between the said W. D. McFadden, David O'Neil, Charles W. Vedder, and W. E. Harris, appellants, and The Mountain View Mining and Milling Company, respondent, a decree was rendered against the said Mountain View Mining and Milling Company in said case, and the said Mountain View Mining and Milling Company having appealed therefrom and filed a copy thereof in the clerk's office of the
164 said court to reverse the decree in the aforesaid suit, and a citation directed to the said W. D. McFadden, David O'Neil, Charles W. Vedder, and W. E. Harris, citing and admonishing them to be and appear at a session of the Supreme Court of the United States, to be holden at the city of Washington, on the 6th of November next:

Now, the condition of the above obligation is such that if the said Mountain View Mining and Milling Company shall prosecute said appeal to effect and answer all damages and costs if it fail to

make the said plea good, then the above obligation to be void; otherwise to remain in full force and effect.

MOUNTAIN VIEW MINING AND MILLING COMPANY, [SEAL.]

[SEAL.] By J. R. TAYLOR, *President.*

Attest: L. A. DOHERTY,
Acting Secretary.

AMERICAN SURETY COMPANY OF NEW YORK, [SEAL.]

Attest:
[SEAL.] By M. M. COWLEY,
Resident Vice-President.
By C. S. VOORHEES,
Resident Ass't Secretary.

[Canceled int. rev. stamps.]

Signed, sealed, and delivered in the presence of—
L. S. ROBERTS.

Approved by—
WM. B. GILBERT,
United States Circuit Judge.

STATE OF WASHINGTON, } ss:
County of Spokane, }

M. M. Cowley, being first duly sworn, says: I am the vice-president of the American Surety Company of New York, a corporation, which is surety on the foregoing undertaking; that said corporation is a resident and householder in Spokane county, Washington, and that it is worth the sum of five hundred dollars over
165 and above all its just debts and liabilities, exclusive of property exempt from execution.

I further say that said corporation is by its articles of incorporation authorized and empowered to sign and execute such undertakings as the foregoing, and that said corporation has fully complied with the laws of the State of Washington, and is duly licensed to transact a surety business within the State of Washington for the current year.

M. M. COWLEY.

Subscribed and sworn to before me this 3 day of Oct., A. D. 1899.

L. S. ROBERTS,
Notary Public in and for the State of Washington, Residing at Spokane.

(Endorsed:) Bond on appeal to Supreme Court U. S. Filed Oct. 16, 1899. Frank D. Monckton, clerk, by Meredith Sawyer, deputy clerk.

166 United States Circuit Court of Appeals for the Ninth Circuit.

W. D. McFADDEN, DAVID O'NEIL, CHARLES W. VEDDER, and W. E. Harris, Plaintiffs in Error and Appellants,
v.
THE MOUNTAIN VIEW MINING AND MILLING COMPANY, Defendant in Error and Appellee. } No. 482.

I, Frank D. Monckton, clerk of the United States circuit court of appeals for the ninth circuit, do hereby certify the foregoing one hundred and sixty-five (165) pages, numbered from one (1) to one hundred and sixty-five (165), inclusive, to be a full, true, and correct copy of the transcript of the record, the order of submission, the opinion, the judgment, the petition for and order allowing appeal to the Supreme Court of the United States, the assignment of errors, and the bond on appeal in the above-entitled cause as the originals thereof remain and appear of record in my office, and that the same together constitute the transcript of record on appeal to the Supreme Court of the United States therein.

Seal United States Circuit Court of Appeals, Ninth Circuit.

Attest my hand and the seal of said United States circuit court of appeals for the ninth circuit, at San Francisco, California, this 7th day of November, A. D. 1899.

F. D. MONCKTON, *Clerk*,
By MEREDITH SAWYER,
Deputy Clerk.

{Ten-cent U. S. internal-revenue stamp, canceled Nov. 7, '99. F. D. M., by M. S.}

167 In the Supreme Court of the United States.

MOUNTAIN VIEW MINING AND MILLING COMPANY, a Corporation, Appellant,
vs.
W. D. McFADDEN, DAVID O'NEIL, CHARLES W. VEDDER, and W. E. Harros, Appellees.

Citation.

UNITED STATES OF AMERICA, *ss:*

To W. D. McFadden, David O'Neil, Charles W. Vedder, and W. E. Harris, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, to be holden at the city of Washington, on the 6th day of November next, pursuant to an appeal allowed and filed in the clerk's office of the United States circuit court of appeals for the ninth circuit, wherein The Mountain View Mining and Milling Company is appellant and you are respondents, to show cause, if any there be, why the decree made and entered

against said appellant, as in the said appeal mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, this 7th day of October, in the year of our Lord one thousand eight hundred and ninety-nine, and of the Independence of the United States the one hundred and twenty-fourth.

WILLIAM B. GILBERT,
United States Circuit Judge.

168 UNITED STATES OF AMERICA, } ss:
District of Washington, }

I hereby certify that I served the within citation on William T. Stoll and Ernest C. MacDonald, the attorneys of record for the within-named W. D. McFadden, David O'Neil, Charles W. Vedder, and W. E. Harris, on the 11th day of October, 1899, at the city of Spokane, in the county of Spokane and district of Washington, by then and there delivering to the said William T. Stoll and Ernest C. MacDonald, each personally, a true copy of the within citation.

Dated at Spokane, Washington, this 11th day of October, A. D. 1899.

C. W. IDE,
U. S. Marshal,
By GEO. L. IDE, *Deputy.*

169 [Endorsed:] D. No. 482. In the United States Supreme Court. Mountain View Mining & Milling Company, appellant, *vs.* W. D. McFadden, David O'Neil, Charles W. Vedder, and W. E. Harris. Citation. Service of the within citation and receipt of a copy thereof admitted this 11th day of October, 1899. —— ——, solicitor for appellee and respondent in lower court. Filed Oct. 16, 1899. Frank D. Monckton, clerk, by Meredith Sawyer, deputy clerk.

Endorsed on cover: File No., 17,578. U. S. C. C. of appeals, 9th circuit. Term No., 162. The Mountain View Mining and Milling Company, appellant, *vs.* W. D. McFadden, David O'Neil, Charles W. Vedder, & W. E. Harris. Filed December 1st, 1899.

In the Supreme Court of the United States.

MOUNTAIN VIEW MINING & MILLING COMPANY, Appellant,
v.
W. D. MCFADDEN ET AL., Respondents.

No. 162. Stipulation.

It is hereby stipulated that the order of the circuit court of the United States, ninth circuit, for the district of Washington, eastern division, made and entered in the above-entitled cause on the 7th day of April, 1897, overruling the motion of the then plaintiff to remand this cause to the State court because said circuit court did not have jurisdiction, a full, true, and certified copy of which is hereto annexed, marked Exhibit A, and made a part hereof, be, and it is hereby, made a part of the record of this case in this court, and the clerk is hereby authorized to attach the same to and make it a part of the record in this case.

Dated this 5th day of July, 1900.

W. B. HEYBURN,
Solicitors for Appellant, Mountain View Mining & Milling Co.
A. B. BROWNE,
ALEX. BRITTON,
Solicitors for Respondents, W. D. McFadden et al.

EXHIBIT "A."

W. D. MCFADDEN ET AL.
vs.
THE MOUNTAIN VIEW MINING AND MILLING COMPANY.

This cause came up for hearing on motion of plaintiffs' counsel to remand to superior court of Stevens county, State of Washington, and the court, having heard the arguments of counsel and being fully advised in the premises—

It is ordered that said motion be, and the same hereby is, denied.

Wednesday, April 7, 1897.

(Page 535, Clerk's Minute Book.)

UNITED STATES OF AMERICA, *District of Washington,* } ss.

I, A. Reeves Ayres, clerk of the circuit court of the United States for the ninth judicial circuit, district of Washington, do hereby certify the foregoing to be a full, true, and correct copy of the original entry made in clerk's minute book in the foregoing entitled case on Wednesday, April 7th, 1897, on page 535, as the same appears on file and of record in said court.

Attest my hand and the seal of the said circuit court 5th day of July, 1900.

(Seal United States Circuit Court, District of Washington, Eastern Division.)

A. REEVES AYRES, *Clerk*,
By JAMES O'NEILL, *Deputy*.

[Ten-cent U. S. internal-revenue stamp, canceled July —, 1900. J. O'N.]

[Endorsed:] No. —, original. No. —. In the United States circuit court for the district of Washington, eastern division. W. D. McFadden *et al. vs.* Mountain View Mining & Milling Co. Certified copy of motion to remand.

[Endorsed:] File No., 17,578. Supreme Court U. S, October term, 1900. Term No., 162. The Mountain View Mining & Milling Co., app't, *vs.* W. D. McFadden *et al.* Stipulation of counsel and addition to record. Office Supreme Court U. S. Filed Jul- 30, 1900. James H. McKenney, clerk.

Office Supreme Court U.S.
FILED
DEC 8 1900
JAMES H. McKENNEY
Clerk

No. 162.

Brf. of Heyburn & Doherty for Appellant.

17,578

IN THE

SUPREME COURT

Filed Dec. 8, 1900.

OF THE

UNITED STATES.

OCTOBER TERM, 1900.

No. 162.

MOUNTAIN VIEW MINING AND MILLING COMPANY,

Appellant,

vs.

W. D. McFADDEN, DAVID O'NEIL, CHARLES W. VEDDER, and W. E. HARRIS,

Appellees.

Appeal from the United States Circuit Court of Appeals for the Ninth Circuit.

Brief of Appellant.

W. B. HEYBURN,
L. A. DOHERTY,
Attorneys for Appellant.

17,578.

IN THE

SUPREME COURT

OF THE

UNITED STATES.

OCTOBER TERM, 1900.

No. 162.

MOUNTAIN VIEW MINING AND MILLING COMPANY,

Appellant,

vs.

W. D. McFADDEN, DAVID O'NEIL, CHARLES W. VEDDER, and W. E. HARRIS,

Appellees.

Appeal from the United States Circuit Court of Appeals for the Ninth Circuit.

Brief of Appellant.

STATEMENT OF CASE.

This case was tried in the Court below as an action at law. The Circuit Court of Appeals for the Ninth Circuit have held that all suits brought under the provisions of Section 2326 are suits in Equity, without regard to the position of the parties as to possession or otherwise. We have therefore come into this Court by appeal instead of by writ of error.

It is an action brought in support of an adverse claim

filed against an application for patent under the provisions of Section 2326 of the Revised Statutes of the United States.

The case was tried in the Circuit Court upon an agreed statement of facts, found in the Transcript at pages 35 to 39. This agreed statement of facts concedes the validity and regularity of appellant's location, provided that the North half of what was formerly the Colville Indian Reservation had been opened to the location of mining claims by the Act of Congress of July 1st, 1892, entitled "An Act to provide for the opening of a part of the Colville Reservation, in the State of Washington, and for other purposes."

27 U. S. Statutes, page 62.

The 11th paragraph of the stipulated facts (Trans. page 39, folio 78) states: "This stipulation is intended to admit "the validity of the location of the said Mountain View claim "in all respects, if at the time the same was located the lands "embraced therein were subject to location as a mineral claim; "and it is also intended to admit the validity of the locations of "the plaintiff's mineral claims, the Columbia or Gray Eagle "and Kruger or Exchequer, in all respects, if the Court deter- "mines that at the date of the location thereof the lands on "which the same are situated were vacant and subject to loca- "tion as mineral claims, defendant's pretended mineral claim "being prior in point of time."

The appellant's location of the Mountain View lode claim was made on the 16th day of October, 1895. (Trans. p. 36. folio 71.) The appellees' claims were located on February 20th, 1896.

This latter date was the date of the passage of the Act of Congress, approved February 20th, 1896, entitled, "An act to extend the mineral land laws of the United States to the lands embraced in the North half of the Colville Indian Reservation."

29 U. S. Statutes, page 9.

By the stipulation of facts it is agreed that the only question involved, to be considered by the Court is as to whether or not the land upon which these locations were made, being originally included within the North half of the Colville Indian Reservation, was thrown open to the location of mining claims by the Act of July 1st, 1892.

27 U. S. Statutes, page 62.

The action was originally commenced in the State Court, and removed to the United States Court on the ground that a Federal question was involved. The petition for removal in this case specifically sets up the controversy as to whether or not the reservation had been opened so as to permit the location of mining claims. (Trans. pp. 7 to 11.)

It is claimed that the Courts will take notice of the geography of the country and of the fact that the Mountain View lode claim was located upon what had been or was an Indian reservation and will further take notice of the Act of Congress declaring the North half of the Reservation upon which this claim was located to have been restored to the Public Domain, and that the Court will assume jurisdiction of this case, because of its knowledge of that fact, whether the same be stated

in the bill or not. If the Court will not take notice of the fact that this controversy arises over land situated within the North half of the Colville Reservation, and that the determination of this question rests upon an interpretation of the Act of Congress of July 1st, 1892, and will not take notice of any facts set up in the petition for removal, then this case would come within the ruling of this Court in the case of Shoshone Mining Co. vs. Rutter and Bradley, in the 177 U. S., 505.

The Circuit Court, at the trial, held that the Act of July 1st, 1892, restored the land in controversy to the public domain, and that it was therefore subject to the location of mining claims. The Circuit Court of Appeals reversed this decision, holding that the land was not subject to location as a mining claim until the passage of the Act of February 20th, 1896. The appellant has specified as error the following:

I

That it appears upon the face of the bill, that the plaintiffs have an adequate remedy at law.

II

That the said plaintiffs have not in and by said bill made or stated such a cause as doth or ought to entitle them to any such discovery or relief as is thereby sought or prayed for from or against the defendant.

III

Because it doth not appear that the action is one arising under the constitution and laws of the United States.

V

The decision of the United States Circuit Court of Appeals for the ninth circuit wherein it holds that the land and premises located and claimed as the Mountain View mining claim was not open to location as a mining claim prior to the 20th day of February, A. D. 1896, and at the time of the location of the said Mountain View mining claim.

VI

The judgment of the said Circuit Court of Appeals that the location of the Mountain View mining claim was invalid by reason of the fact that the land and premises were within an Indian Reservation and not subject to location at the time the same was made by the defendant.

ARGUMENT.

The first assignment of error is directed to the question as to whether in this action the plaintiff below had an adequate remedy at law. The Circuit Court so held. The Circuit Court of Appeals treated it as a suit in equity, and we have therefore been compelled to treat it as such upon this appeal.

The agreed statement of facts renders it unnecessary to specifically consider the second assignment of error.

If the Court shall hold that notice will be taken of the fact that this controversy arises over lands lying within what had been an Indian Reservation, and that the controversy being as to whether or not by virtue of the Act of Congress this reser-

vation was restored to the public domain so that it became open to the location of mining claims, then the third assignment of error would be disposed of, but if the Court holds that it will not take notice of that fact, which is specifically set up in the agreed statement of facts as well as in the petition for removal while not specifically stated in the complaint filed in the State Court, or that such fact may be gathered from the original complaint taken in connection with the Court's knowledge of the geography of the country, then the case was erroneously removed and the United States Court would not have jurisdiction of the case.

At the time when these proceedings were had in the Circuit Court, it had been established by the decision of the Circuit Court of Appeals for the ninth circuit, that these cases were removable because of the fact that they were brought pursuant to the provisions of Section 2326 of the Revised Statutes of the United States, but this doctrine has been overthrown by the recent decision of this Court in the case of

Blackburn vs. Portland Min. Co., 175 U. S., 581.

Shoshone Min. Co. vs. Rutter, et al., 177 U. S., 505.

The 5th and 6th assignments of error go to the real question involved in the controversy and we will consider them together.

The question of whether or not this reservation was restored to the public domain so that it was open to the location of mining claims was first raised in the case of Collins vs. Bubb, 73 Fed., page 735, and the decision of Judge Hanford in that

case constitutes a most thorough and exhaustive consideration of the question as to the effect of the Act of July 1st, 1892, and holds that by virtue of that act the reservation was restored to the public domain and that a location of a mining claim made thereon was valid.

A great many mining locations were made upon the portion of the reservation which was declared to have been restored to the public domain by the Act of July 1st, 1892, and many of those locations have gone to patent.

In this case it will be seen from the opinion of Judge ———— who heard it in the Circuit Court (Trans. pp. 40-43), that the rule stated in Collins vs. Bubb was thoroughly considered, and re-affirmed, as is also the effect of the Act of Congress of February 20th, 1896, upon which appellees rely.

In 1896, Congress in two special acts extended the mineral land laws so as to apply to the tract of land which was by the Act of July 1st, 1892, declared to be restored to the public domain, and granted a right of way across the tract to a railway corporation. The argument from this is that these enactments were unnecessary, if the act of 1892 did of itself *eo instanti* take the tract out of the reservation and restore it to the public domain; that Congress would not do a vain thing, and that therefore it must be presumed that the act of 1892 as construed by the courts remained ineffective. This is the view that the Circuit Court of Appeals has taken of these acts of 1896, but such is not the necessary inference. The executive branch of the government having denied the rights of prospectors, miners

and railroad builders upon this part of what had been the Colville Reservation, Congress may have very well considered that in itself sufficient reason for additional legislative acts; it certainly does not show a disposition on the part of Congress to acquiesce in the rulings of the interior department, but rather to continue the purpose formerly expressed by it in the Act of 1892, and remove the barriers in the way of mining operations and the construction of highways, which purpose was first formulated by the Act of August 19th, 1890 (26 Stat., 355), which provided for a commission to negotiate with the Colville Indians for a relinquishment of a part of their territory, as plainly expressed in their report to the House of Representatives by its committee on Indian Affairs, which preceded the enactment of the law of 1892, and afterwards made emphatic by these two enactments of 1896. And conceding that the construction of the act of 1892 by the executive officers of the government, is contrary to the opinion of the Circuit Court, that court is not bound to accept the conclusion of the interior department as to the interpretation of the Act of Congress, and Judge Hanford says in the opinion rendered by him (Trans. page 43, folio 86) that he has given careful consideration to the conclusion of the interior department, but that the words of Congress are plain and their meaning is clear, and they must prevail. This upon the authority of

U. S. vs. Tanner, 147 U. S., 661-663.

Merritt vs. Cameron, 137 U. S., 542.

U. S. vs. Graham, 110 U. S., 219.

Swift Co. vs. U. S., 105 U. S., 691.

Hartman vs. Warren, 76 Fed. Rep., 157-162.

The Circuit Court of Appeals concludes that the Act of Congress of February 20th, 1896, was a legislative interpretation of the provisions of the enactment of July 1st, 1892, but we think the construction of the act by Judge Hanford (Trans. page 42, folio 85) is the more reasonable. The very fact that there was an existing controversy as to the meaning of the Act of Congress at the time of the passage of the Act of February 20th, 1896, might have seemed sufficient reason for Congress to settle all controversy by re-affirming existing legislation. In any event the Court is not bound by the legislative interpretation or construction of the statutes. The Court will construe each statute according to established rule of law and precedent. It is no part of the duty of Congress to interpret its own enactments, that duty and right rests entirely with the courts. Congress may pass new laws, but they cannot construe existing ones.

The question is as to the right of a citizen of the United States who is a qualified locator of a mining claim, under the Act of May 10, 1872, to locate and hold a lode claim upon that portion of the old Colville Reservation, in the State of Washington, described in the first paragraph of the Act of July 1, 1892, of the Laws of the Fifty-Second Congress, First Session, page 62.

It appears by the answer and stipulated facts, that in the

month of October, 1895, Charles N. Collins, defendant's grantor, went upon that portion of the old Colville Indian Reservation, which by said Act was declared to be restored to the public domain, and located the Mountain View mining claim thereon. No question is raised as to the sufficiency of his discovery or the making of the locations, and for the purpose of determining the legal proposition herein to be considered, no objection can be raised against the right of the complainant to make such locations and occupy and mine the same, except that by said answer and stipulation it is admitted that said location is upon that portion of the old Colville Indian Reservation described in the first paragraph of said Act of Congress and therein referred to as being restored to the public domain.

The Circuit Court of Appeals failed to distinguish between the original opening of lands to settlement or the location of mining claims or the subjection of the same to the land laws of the United States and a case where the lands had originally been open to such location but temporarily withdrawn. In the case at Bar under the Act of 1866 these lands had been open to location as mining claims a number of years prior to the issuance of the executive order of April, 1872, which withdrew them, and the Act of Congress only restored them to the condition in which they had once existed.

The question then is, did said Act of Congress open that portion of said reservation so that location of mining claims may be made thereon, by a qualified locator?

The section of said Act under which the locator justifies his entry upon the premises in question reads as follows:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled:

"That subject to the reservations and allotment of lands in severalty to the individual members of the Indians of the Colville Reservation in the State of Washington herein provided for, all the following described tract or portion of said Colville Reservation, namely: Beginning at a point on the eastern boundary line of the Colville Indian Reservation, where the township line between townships 34 and 35 north, of range 37 east, of the Willamette meridian, if extended west, would intersect the same, said point being in the middle of the channel of the Columbia river, and running thence west parallel with the forty-ninth parallel of latitude to the western boundary line of the said Colville Indian Reservation in the Okanogan river, thence north following the said western boundary line to the said forty-ninth parallel of latitude, thence east along the said forty-ninth parallel of latitude to the northeast corner of the said Colville Indian Reservation, thence south following the eastern boundary of said reservation to the place of beginning, containing by estimation one million five hundred thousand acres, the same being a portion of the Colville Indian Reservation created by executive order, dated July second, eighteen hundred and seventy-two, be, and is hereby, vacated and restored to the public domain, notwithstanding any executive order or other proceeding whereby the same was set apart as a reservation for any Indians or bands of Indians, and the same shall be open to settlement and entry by the proclamation of the President of the United States and shall

be disposed of under the general laws applicable to the disposition of public lands in the State of Washington."

By the second section of said Act provision is made that the net proceeds arising from the sale and disposal of the lands so opened to entry and settlement shall be set aside in the Treasury of the United States for the future use of the Indians, etc.

By the third section of said Act it is provided that entry of the lands restored shall be made under the homestead law, and the price to be paid by the entryman is fixed.

By the fourth section of this Act it is provided that within six months after the date of the President's proclamation opening the lands vacated to settlement and entry, and after the same have been surveyed, the Indians shall take by allotment, and that those who reside upon the portion vacated may select their allotment thereon. That no restriction as to locality shall be placed upon such selections other than they shall be so located as to conform to the congressional survey or subdivisions.

Said section also provides that where the Indians have made improvements upon the legal subdivisions that they shall be entitled to select and locate the same.

It is provided in said section that the allotment shall be made under the Act of February 28, 1891, and that said allotment shall be subject to the laws of eminent domain in the state of Washington, etc.

By Section 5, Indians residing upon the portion of the reservation vacated and restored shall have the right to select their allotment upon the portion which is not restored.

Section 6 provides for the reservation for the Tonasket school, mills, etc., upon the portion vacated.

Section 7 makes the appropriation to cover the expense of survey and allotment, and Section 8 distinctly disclaims recognition of any title in the Indians to the lands vacated or to any portion of the reserve.

The rights of the appellant depend entirely upon the construction of the Act of Congress of July 1, 1892, above referred to, entitled "An Act to provide for the opening of a part of the Colville Reservation, in the State of Washington, and for other purposes."

There are a few familiar rules for the interpretation of statutes which have been laid down by the Supreme Court of the United States, which we invoke in this case.

The thing which is within the intention of the makers of a statute is as much within the statutes as if it were within the letter.

U. S. vs. Freeman, 3rd Howard, page 565.

U. S. vs. Babbit, 1st Black, 61.

Gelpcke vs. City of Dubuque, 1st Wall, 221.

Whenever any words of a statute are doubtful or obscure,

the intention of the Legislature is to be resorted to in order to find the meaning of the words.

U. S. vs. Freeman, 3rd Howard, 565.

In this case the Court says, after citing the cases in support of this principle:

"The citations are but different illustrations of the rule that the meaning of the Legislature may be extended beyond the precise words used in the law, from the reason or motive upon which the Legislature proceeded, from the end in view, or the purpose which was designed, the limitation of the rule being that to extend the meaning to any case not included in the words the case must be shown to come within the same reason upon which the lawmaker proceeded, and not only within a like reason."

The intention of the Legislature when discovered must prevail, any rule of construction declared by previous acts to the contrary notwithstanding.

Cooper vs. Telfair, 4th Dallas, page 14.

Wilkinson vs. Lelande et al., 2nd Peters, 662.

Later the Supreme Court of the United States in Smythe vs. Fiske, 23d Wall, 380, says:

"A thing may be within the letter of a statute, and not within its meaning, and within its meaning though not within its letter. The intention of the lawmaker is the law."

In case of doubt the title of the Act may be looked to in

interpreting its meaning. In the case of Smythe vs. Fiske, 23rd Wall, 380, the Court says:

"Where doubt exists as to the meaning of a statute, the title may be looked to for aid in its construction. The pre-existing law and the reason and purpose of the new enactment are also considerations of great weight."

This doctrine was first announced by Chief Justice Marshall in the case of the U. S. vs. Fisher, in 2nd Cranch, 385, wherein the Court says:

"It is undoubtedly a well established principle in the exposition of statutes, that every part is to be considered, and the intention of the Legislature to be extracted from the whole. It is also true that where great inconvenience will result from a particular construction, that construction is to be avoided unless the meaning of the Legislature be plain, in which case it must be obeyed.

"On the abstract principles which govern courts in construing legislative acts, no difference of opinion can exist. It is only in the application of those principles that the difference discovers itself.

"As the enacting clause in this case would plainly give the United States the preference they claim, it is incumbent on those who oppose that preference to show an intent varying from that which the words import. In doing this, the whole act has been critically examined; and it has been contended with great ingenuity, that every part of it demonstrates the

legislative mind to have been directed toward a class of debtors, entirely different from those who become so by drawing or endorsing bills, in the ordinary course of business.

"The first part which has been resorted to is the title.

"On the influence which the title ought to have in construing the enacting clauses, much has been said: and yet it is not easy to discern the point of difference between the opposing counsel in this respect. Neither party contends that the title of an act can control plain words in the body of the statute; and neither denies that, taken with other parts, it may assist in removing ambiguities. Where the intent is plain, nothing is left to construction. Where the mind labors to discover the design of the Legislature, it seizes everything from which aid can be derived; and in such case the title claims a degree of notice, and will have its due share of consideration."

Chief Justice Marshall reannounces this doctrine in the case of the United States vs. Palmer, 3rd Wheat., 631.

In the case of the U. S. vs. Union Pacific R. R. Co., in the 91st U. S., page 72, the rule is laid down: That in construing an Act of Congress the Court may recur to the history of the times when it was passed in order to ascertain the reason for, as well as the meaning of, a particular provision in it.

Under these rules of construction we will proceed to consider the act in question, and first the history of the legislation which resulted in the passage of the act under which we maintain that the lands in question are a part of the public domain

of the United States upon which mineral locations may be made under the provisions of the Act of May 10, 1872.

Under the constitution of the United States, Congress has the complete power and control of the public domain. It may delegate the power to create or vacate reservations, or it may exercise it by different enactment. It has frequently delegated the power both to create and to vacate Indian reservations.

In the case of the Sioux Indian Reservation, Congress by Act approved March 2, 1889, entitled an Act to divide a portion of the reservation of the Sioux nation of Indians in Dakota into separate reservations and to secure the relinquishment of the Indian title to the remainder, and for other purposes, took the initiatory step for restoring a portion of the Sioux Reservation to the public domain, but provided that the consent of the Indians should be obtained, and that thereafter a proclamation by the President should be issued.

Congress again by Act, entitled an Act to extend the northern boundary of the State of Nebraska, approved March 28, 1882, provided that the President should in pursuance of said Act declare that the Indian title is extinguished to all lands described in said Act, and in pursuance thereof the President of the United States did by proclamation on the 3rd day of October, 1890, declare the Indian title extinguished and the lands restored to the public domain.

The proceedings for the opening of this portion of the Colville Reservation were initiated by the Act of Congress approved August 19, 1890. (See Laws of First Session Fifty-

First Congress, page 355.) It is therein provided that the President of the United States be authorized to appoint a commission composed of three persons to visit the Colville Indian Reservation and negotiate with said Indians for the cession of such portion of the said reservation as said Indians may be willing to dispose of, that the same may be opened to white settlers. That the said commission be required to report to the Secretary of the Interior and that the Secretary of the Interior be required to report the facts to Congress. In pursuance of this Act of Congress the President did appoint a commmission consisting of three persons to negotiate with the Indians for the cession of such portion of the reservation as the Indians might be willing to dispose of. The commission made its report on June 8, 1891, to the Secretary of the Interior. The report is found in the message of the President of the United States transmitted to Congress on June 9, 1892.

The commission reported (page 9 of said message):

"That of the portion of the territory ceded, it is estimated that about three hundred thousand acres are suitable for agricultural purposes. The remainder is very valuable for grazing purposes and for the timber thereon. Much of the territory ceded is mountainous and abounds in rich mineral deposits. The southern portion of said reservation, it being the portion of said reservation not ceded, contains the largest proportion of agricultural lands, and the grazing lands upon this portion are for the most part fine. The supply of timber here is quite ample. From the best information the commission has been able to obtain, it is believed that there is upon the portion of

said reservation not ceded an acreage of land suitable for agricultural purposes, very largely in excess of a hundred and sixty thousand acres, the the limitation indicated in department instructions dated October 21, 1891. The commission did not deem it advisable to negotiate with the Indians for the purchase of any greater area of territory than that ceded and are satisfied that the portion of said reservation not ceded contains ample territory for the comfort, security, support and maintenance of all the Indians upon said reservation in their various avocations of life. From the best information the commission could obtain without incurring the expense of a survey, and this was not practicable owing to the scarcity of funds, there remains of the portion of the Colville Reservation not ceded near one million three hundred thousand acres."

The commission thereupon made an agreement with the Indians, which is found at page 13 of the President's message, in which they agreed to surrender and relinquish to the United States, all their right, title, claim and interest in and to the northern half of the Colville Reservation. And by Section 12 of said agreement, page 16 of the President's message, it is provided that this agreement shall go into effect from and after its approval by Congress. This agreement was submitted to Congress by the Secretary of the Interior, together with a proposed bill to be enacted ratifying this treaty, which bill is found at page 20 of the President's message. An examination of the bill will show that it was expected by the Secretary of the Interior that Congress would ratify the treaty and recognize the act of the three commissioners whom he had appointed.

And the form of the proposed bill was approved by the acting Attorney General in the letter found at page 29 of the President's message. .

This message was first taken up and acted upon in the House of Representatives and was referred to the committee on Indian affairs, and this committee reported to the First Session of the Fifty-Second Congress, page 2 of the report, that the necessity for opening at least a portion of so large a reservation is apparent, because of the following reasons among others:

A lessening of the dimensions of the Colville Reservation, the planting of active, prosperous and well-ordered white communities on every side of the Indians, the building of railroads, the creation of towns and cities, the opening of mines, and the consequent establishment of markets near at hand, etc.

Further, that the reservation is surrounded on two sides by the Columbia river, on one side by the wilds of British Columbia, and on the other by a portion of Washington, that has no outlet by rail because the reservation itself stands as a barrier to all railroad construction from the East.

The committee stated as a third reason why the reservation may be opened, that the reservation as it stands today is a great obstacle to the development of the State of Washington and the general progress of the Pacific Northwest. So long as it continues to be the sporting ground of so sparse, thriftless and irresponsible a population, its lands will remain untilled and its mines will remain unopened, being more than the In-

dians need for sustenance and comfort, yielding no revenue to the general government, and being of no taxable value to the state of which it is an inseparable and essential part. It cuts off communication between the eastern and western portions of the state and blocks the way to railroads that stand waiting at its boundaries. A railroad company, a local corporation, has constructed a line from the City of Spokane, the metropolis of Eastern Washington, to Marcus, a point on the Columbia river 100 miles distant, at an expense of over two million dollars, and has surveyed an extension through the reservation to the Okanogan country, an extensive region between the Colville Reservation and the Cascade Mountains, rich in minerals and agricultural products, but wholly without railroad transportation, etc.

The committee proceeded to state that they had modified the proposed treaty with reference to the cash payment of money to the Indians.

That at page 5 of the report, the committee proposes an appropriation of $500 for the purpose of procuring the assent of the Indians to the changes and modifications made in the original agreement.

The bill upon which this report was made was entitled "An act to ratify and confirm an agreement with the Indians residing on the Colville Reservation, in the State of Washington, with certain modifications and making appropriations for carrying into effect the same." This was House Bill No. 7557, introduced in the House and referred to the committee of the

whole on April 9, 1892. The report of the House Committee referred to was upon this bill.

The bill went to the Senate with this title and was there completely changed both as to title and character. The title was changed there to read, "An Act to provide for the opening of a part of the Colville Reservation, in the State of Washington, and for other purposes." Everything in the original Act referring to the treaty entered into by the Commissioners and incorporated in the original bill introduced in the House was abandoned in the Senate. A new Congress had come into office since the passage of the Act providing for the appointment of the commission, and the Senate struck out all reference to the treaty and, disregarding the act of the Commission and the recommendation of the Secretary and the message of the President, enacted as an original proposition that the north half of the Colville Indian Reservation be *vacated and restored to the public domain*, notwithstanding any executive order or other proceeding whereby the same was set apart as the reservation for any Indians or band of Indians, and that the same should be opened to settlement and entry by the proclamation of the President of the United States. The bill went back to the House for concurrence and became a law without the signature of the President.

The decision in this case depends upon the construction to be placed upon the first section of this Act of Congress. It is contended on behalf of defendant in error that by the Act of Congress the lands are fully restored to the public domain to the extent that mining claims may be located thereon under

the Act of May 10, 1872. That the reservations referred to in the first line of said Act are those expressed in the Act and are limited to the reservation for school and other purposes contained in the sixth section of said Act, and a reservation of that class of lands subject to selection and allotment by the Indians who are permitted to make their selection upon that portion of the reservation restored to the public domain where they are residing thereon. It is further contended on behalf of the defendant in error that the proclamation to be issued is the usual one throwing the lands of the appropriate character open to homestead entry and settlement after the same are surveyed.

As hereinbefore shown upon the authority cited, Congress sometimes delegates the power and duty of proclaiming lands restored to the public domain to the President, as in the case of the Sioux Reservation hereinbefore referred to, it requiring the proclamation of the President to restore the lands to the public domain, but in this case Congress has provided only that the proclamation of the President shall affect lands subject to "settlement and entry."

In all instances where Congress refers to the disposal of mineral lands it uses the terms "location and purchase." Where it refers to lands other than mineral lands, Congress uses the terms "settlement and entry," which are the terms applicable to the proceedings to be taken in the U. S. Land Office for acquiring title to public lands. The title to mineral lands is not acquired in or through the U. S. Land Office,

unless parties desire to supplement their title by proceeding to U. S. patent.

The title of a mining claim is absolutely perfected without the aid or interposition of the U. S. Land Office. It is acquired by locating the mining claim upon the ground and recording in the state or territorial local office. Mineral lands are not within the contemplation of Congress, when it provides for the allotment of lands to Indians. The Act of February 28, 1891, second supplement, Revised Statutes of the United States, page 397, under which it is provided by the Act opening this reservation, that the lands shall be allotted specifically designates *agricultural and grazing* lands, as those that may be allotted to the Indians, and in all other instances where the allotment of lands to the Indians is provided for it is limited to *agricultural* and *grazing* lands.

There are minerals not within the scope of the mining act which are found sometimes on such lands, as the Indians may select, such as valuable clays, iron, etc., or valuable minerals might be found on allotted lands after title had passed to the Indians. Thus Congress made the provision in Section 3 of the Act of February 28, 1891, but known mineral lands cannot be selected.

Counsel have laid some stress upon the statement in the Act restoring the Colville Reservation in the fourth section thereof, that:

"No restriction shall be placed upon said selection other

than that they shall be so located as to conform to the congressional survey or subdivisions of said tract of country."

We must construe this phrase in connection with the whole act and with the object and purpose of the legislation which resulted in its passage. It will not be seriously contended that because of the uncertainty of this phrase in the act that the Indians might select and take by allotment mineral lands or lands known to be valuable for the mineral deposits contained therein.

The policy of the general government with reference to its mineral lands has been so long and so clearly established by interpretation of the mineral acts in the Supreme Court of the United States that there is no longer room for controversy.

The title of the Act of 1866, which first provided for the location of mining claims upon the public domain, designates it as an Act to promote and encourage the development of the mineral resources of the United States. The Supreme Court in the case of Steel vs. Smelting Co., 106 U. S., page 449, says: "It is the policy of the country to encourage the development of its mineral resources," and specifically declares this to be the policy of the government both under the Act of 1866 and May 10, 1872, which is the mining act now in force as incorporated into the Revised Statutes of the United States, Section 2319, and following.

It is clearly apparent from the report of the committees having the bill under consideration which resulted in the

legislation opening this portion of the Colville Reservation, that one of the strongest motives moving Congress toward this legislation was the opening of the mineral resources of this section of the country. It is especially referred to in every instance and we are bound to conclude that Congress was acting with a full knowledge of the mineral acts and the interpretation placed upon them in enacting this law. And that it had some distinct and well-defined purpose in changing the character and scope of the legislation originally proposed by the Secretary of the Interior which resulted in the change of the title of the Act itself, and in the complete disregard of the unperfected treaty which had been entered into by the Commission and recommended by the Secretary, and in the complete abandonment of the original proposition contained in the House bill, as it went to the Senate providing for the resubmission of the treaty to the Indians for their ratification, and in substituting for all this a bill declaring in express terms that the part of the reservation in controversy, "Is hereby vacated and restored to the public domain."

Then again in Section 5 of the said Act, Congress in referring to these lands refers to them, "As hereby vacated and restored."

If Congress intended to delay the full restoration of these lands to the public domain until the proclamation of the President should issue for that purpose, why did it depart from the line of action adopted by it in the case of the Sioux Reservation before referred to?

We maintain that by the Act Congress fully restored the north half of the Conville Reservation to the public domain for all purposes, subject only to the allotment of lands to the Indians, and that any rights relative to the location of mining claims or railroads upon the public domain or the performance of any of those acts which may be done upon the unsurveyed public domain of the United States, that this portion of the reservation is now as fully open as though such reservation had never existed.

Mining claims and rights of way for railroads may be acquired upon the unsurveyed public domain of the United States. Homestead entries may not. The class of title that is to be acquired pursuant to the President's proclamation to be issued cannot be acquired upon the unsurveyed public domain and do not come within the same class of consideration as mining claims. In order to open the public domain to homestead entry, it is not only necessary that the lands should be surveyed, but it is also necessary that they should be proclaimed open to settlement.

It was competent for the President to have vacated any portion of this reservation and to have had the same surveyed without the aid of an Act of Congress, and we are bound to conclude the passage of this Act was for the purpose of restoring these lands to the public domain without the aid of the executive order, and that Congress did not do a vain thing in enacting the law, but that it was for the carrying out of the purposes expressed in the report of the committee having charge of the bill that these lands should be restored to the

public domain *quickly*, and without the necessity of an executive order, because of the fact that they contained valuable mineral deposits which are of no use to the Indians, and for the further reason that this portion of the reservation constituted a barrier between the eastern and western portion of the great state through which railroads could not force their way and upon which mineral locations could not be made. Had it not been for the necessities arising out of this condition of affairs so far as it affects mineral lands and the rights of railroad companies, Congress might and doubtless would have allowed the restoration of these lands to the public domain to have awaited the slower process of an executive order issued after the survey of the lands in question. The lands that pass to the Indians by allotment cannot be sold for a period of twenty-five years. The legislation that so provides cannot be said to be in the interest of rapid development of the mineral resources of the United States, and would clearly be against the policy of the government as expressed by Congress and by the Supreme Court that "it is the policy of the country to encourage the development of its mineral resources." It is fair to conclude that Congress had this policy in view when it discarded the slow process of amending the treaty and procuring the consent of the Indians thereto, necessitating a long delay in restoring these lands to the public domain, so that the mineral portions thereof would be available.

The Interior Department, through the Commissioner of the General Land Office, issues at stated intervals official maps prepared within the department by its officers, bearing the ap-

proval of the Commissioner of the General Land Office, which maps are furnished to the United States Land Offices and other officials having charge of the disposal of the public domain, and are intended to direct and control their official acts. Prior to the passage of the Act of 1892 these department maps showed the Colville Indian Reservation as extending to the British Columbia line, and after the passage of that Act these official maps indicated the northern portion of the Colville Indian Reservation as restored to the public domain and as constituting no part of the Colville Indian Reservation. This interpretation of the Act of Congress, emanating from the department having charge of the public lands and Indian reservations, is entitled to consideration in connection with the object and purpose of the Act itself.

Much stress has been laid upon the provision at the end of the first section of the act declaring this reservation restored to the public domain, wherein it is provided that the reservation shall be open to settlement and entry by "proclamation" of the President of the United States. This word "proclamation" does not necessarily mean that there shall be a formal proclamation issued by the President. In the case of Wolsey vs. Chapman, 101 U. S., page 769, the Supreme Court holds that the acts of the heads of departments within the scope of their powers are, within the law, the acts of the President. This doctrine was first enunciated so far as we know in the case of Wilcox vs. Jackson, in the 13th Peters, page 512. This case covers two points urged by us in support of our contention. First, that the same weight is to be attached to the

fact that the department having charge of Indian reservations has indicated by its official maps sent out that the lands upon which defendant in error's locations are made were not within the Indian reservation; and, second, that where a proclamation is authorized or required to create or abolish a reservation, that it does not necessarily follow that a formal proclamation must issue, but that an order or official action upon the part of the heads of the departments acting for him is equivalent to a proclamation. In the case of Wilcox vs. Jackson, the Commissioner of the General Land Office colored and marked upon the map the Ft. Dearborn Reservation, and the Court says of this act: "We consider this, too, as having been done by authority of law, for amongst other provisions in the Act of 1830, all lands are exempted from pre-emption which are reserved from sale by order of the President. Now, although the immediate agent in requiring this reservation was the Secretary of War, yet we feel justified in presuming that it was done by the approbation and direction of the President. The President speaks and acts through the heads of the several departments in relation to subjects which appertain to their respective duties. Both military posts and Indian affairs, including agencies, belong to the War department. Hence we consider the act of the War Department in requiring this reservation to be made as being in legal contemplation the act of the President, and consequently that the reservation thus made was in legal effect a reservation made by order of the President within the terms of the Act of Congress."

At the time this decision was rendered, the Indian reser-

vations were under the control of the War Department. They are now under the control of the Interior Department, which has been created since that time.

This doctrine is taken up in the case of Wolsey vs. Chapman, in the 101 U. S., pages 769-70, wherein the Court says:

"A proclamation by the President reserving lands from sale is his official public announcement of an order to that effect. No particular form of such an announcement is necessary. It is sufficient if it has such publicity as accomplishes the end to be attained."

In the case at bar, the Interior Department has issued its official map of the United States showing that the lands in question were not within the Colville Indian Reservation. These maps are printed by authority and under Sections 3779-3781 of the Revised Statutes of the United States, at the expense of the government, in the public printing office, and under the provisions of the Act of June 23, 1874, Second Supplement, Revised Statutes, page 42, they are presumably printed by special order of Congress, which act provides, "That no expensive maps or illustrations shall be printed without the authority of Congress."

The Court will take notice of this map as it would of any other public document issued by authority of Congress and of the Executive Department of the government, which needs not to be introduced in evidence to be a part of the evidence of the case. It is a public record, and is equivalent to an order issued out of the Interior Department as the repre-

sentative of the President, as in the case of the Ft. Dearborn Reservation before referred to. It will not be contended that it requires any greater certainty or more precise form of procedure to open a reservation than would be required to create one.

The order creating the Colville Reservation is contained in a few lines as follows:

"Executive Mansion, Washington, April 9, 1872.

"It is hereby ordered that the tract of country referred to in the within letter of the Commissioner of Indian Affairs as hving been set apart for the Indians therein named by executive order of April 9, 1872, be restored to the public domain and that in lieu thereof the country bounded on the east and south by the Columbia river, on the west by the Okanogan river, and on the north by the British possessions, be, and the same is hereby set apart as a reservation for said Indians, and for such other Indians as the Department of the Interior may see fit to locate thereon. U. S. GRANT."

Nothing could be more informal than this. It contains no provisions that the reservations shall be for the exclusive use of the Indians and contains none of the ordinary restrictions that surround the reservations that have been considered in the decisions referred to. Congress by express terms declares it restored to the public domain, notwithstanding this executive order. The Executive Department of the government recognizes the restoration of it and so indicates it upon its official map. This map contains the following legend and certificate:

"DEPARTMENT OF THE INTERIOR,
UNITED STATES LAND OFFICE,
HON. SILAS W. LAMOREUX, COMMISSIONER,
UNITED STATES AND TERRITORIES.

"Showing the extent of public surveys, Indian, Military and Forest Reservations. Railroads and Canals and other details.

"Compiled from official surveys of the General Land Office and other authentic sources, under the direction of Harry King, C. D., Chief of Drafting Division. 1895."

100

In the case of Noonan vs. Caledonia Min. Co., 121 U. S., page 401, the question of the right to locate a mining claim upon an Indian reservation was squarely before the Supreme Court of the United States, and it was held that while the location of a mining claim cannot be made upon an Indian reservation existing under treaty such as the one had with the Sioux Indians, yet that the acts done by the locator while the reservation yet remained in existence might be taken advantage of by the locator after the passage of the Act of Congress of February 28, 1877. The Court fixes that day as the day after which a mineral location might be made within what had before that time been the Sioux Reservation, and not the day upon which the President should by proclamation declare these lands open to settlement and entry. An examination of the statutes will disclose the fact that the Act providing

for the opening of the Sioux Reservation, including the Black Hills, Dakota, was passed and became a law on the 28th of February, 1877, and yet the proclamation of the President opening the agricultural lands in that portion of the reservation was not issued until long afterward. The Supreme Court treats the date of the Act of Congress as the time when the lands were open to location of mineral claims and not the date of the proclamation of the President.

It will be noticed by reading both the case of Noonon vs. Caledonia Min. Co. and the case of Kendall vs. the San Juan Mining Co., in the 144 U. S., 663, that the Supreme Court bases its decision that the mining claims cannot be located within the reservation expressly upon the ground that "by the terms of the treaty" the tract of country which included the mining property in question was set apart for the absolute and undisturbed use and occupation of the Indians therein named, etc., and that the United States has solemnly agreed that no person except those in the treaty designated and authorized so to do "shall ever be permitted to pass over, settle upon or reside in the territory" described in said article, etc. Both these Indian treaties were made prior to March 3, 1871, at which time Congress enacted the following:

"No Indian nation or tribe within the territory of the United States shall be acknowledged or authorized as an independent nation, tribe, or power with whom the United States may contract by treaty, but no obligation of any treaty lawfully made and ratified with any such Indian nation or tribe prior to

March third, eighteen hundred and seventy-one, shall be hereby invalidated or impaired."

Prior to the passage of the Act of 1871, Congress recognized treaties made with the Indian tribes and nations with a peculiar sanctity, and while refusing in many instances to recognize them as independent nations with whom treaties might be made, Congress invariably construed all questions arising between the whites and Indians in the light of the treaty rights of such Indians. But since the enactment of Section 2079 of the Revised Statutes, Congress has adopted a different method of dealing with the Indians and the Courts will of necessity be compelled to adopt a different rule of construction adapted to the changed condition of the law. No stipulation of "exclusive enjoyment or occupation" is found in the executive order creating the Colville Indian Reservation, but by the language of the executive order the country described is set apart as a reservation for said Indians and for such other Indians as the Department of the Interior may see fit to locate thereon. And in the letter of the Commissioner, found at page 83 of the pamphlet "Executive Orders Relating to Indian Reserves," it is not proposed or recommended that the reservation be set apart for the exclusive use of these Indians.

The Act of July 26, 1866, was passed and in force prior to the creation of this reservation. All these mineral lands claimed by the complainant were open to exploration and purchase by that Act at the time and prior to the making of the

executive order claiming to reserve this land for the limited purpose of the use of the Indians.

This Act declared "that the mineral lands of the public domain, both surveyed and unsurveyed, are hereby declared to be free and open to exploration and occupation by all citizens of the United States and those who have declared their intention to become citizens, subject to such regulations as may be prescribed by law, and subject also to the local customs and rules of miners, of the several mining districts so far as the same may not be in conflict with the laws of the United States."

On May 10, 1872, twenty-nine days after the creation of the Colville Reservation, Congress enacted the present mining law, Revised Statutes of the United States, Section 2319, in substantially the same language.

If we are to adopt the reasoning of the Circuit Court of Appeals, we might conclude because Congress without referring to the existing law which authorized the location of mining claims, enacted the law of 1872, that a location made under the law of 1866 would be void, but the fact is that the Act of 1872 merely re-stated the existing law of 1866, so far as declaring the public mineral lands of the United States open to location, whether made under the act of 1866, or 1872, they were alike valid. So we contend that the locations made upon the north half of the Colville Reservation, whether made under the Act of 1892 or 1896, have equal validity.

The Act of Congress, approved March 21, 1866, under which the State of Nevada was created, gave to the state the sixteenth and thirty-sixth sections for school purposes, and in July, 1868,

the State of Nevada issued a patent to William Webehuth for the west half of the southwest quarter of Section 16, in Township 16 north, Range 21 east, lying in Lyon County, according to the official plat of the survey of the public lands made by the United States Surveyor General for the District of Nevada, which patent was recorded in the Recorder's Office of Lyon County on the 25th day of July, 1868, and was issued by the said authorities under and by virtue of the statute conveying the lands assumed to have been granted to the state by the Act of Congress creating the state.

In 1867 a qualified locator of a mining claim located a mining claim upon this same ground, which the state had assumed to convey. This location was made under the mining act approved July 26, 1866; the patent was issued for said mining claim on March 21, 1874. The question was, did the Act of Congress reserve to the use for school purposes to the State of Nevada the sixteenth and thirty-sixth sections of land granted them from the public domain to that extent that a mining location cannot be made thereon?

The Supreme Court of the United States disposes of this question between the claimants in the case of Heydenfeldt vs. Daney Gold Min. Co., in the 93rd U. S., 634, and says that it has been the settled policy of the government to promote the development of the mining resources of the country, and that while Congress was desirous that the people of Nevada in forming a state government should have all of the benefits with reference to the donation of land for educational purposes, yet inasmuch as said lands cannot be taken until surveyed, etc.,

that it would be against the policy of the government, which favors the development of the mineral resources of the country, not to sustain the right to locate a mine within the state until these school sections should be determined, or in the alternative to make the miner take the risk of finding himself and his improvements upon a school section. And the Supreme Court refuses to recognize the rights of the grantee of the State to these mineral lands, basing its decision largely upon the question of the policy of the government with reference to its mineral lands.

Counsel at the argument of this case cited the case of Wilcox vs. Jackson, in the 13th Peters, 498, as defining what are public lands and read therefrom:

"That whensoever a tract of land shall have once been legally appropriated to any purpose, from that moment the land thus appropriated becomes severed from the mass of the public lands; and that no subsequent law or proclamation, or sale, would be construed to embrace it or to operate upon it, although no other reservation were made of it."

We have no contention with this abstract proposition, but maintain that the Act of Congress opening this reservation, construed under the proper rules, takes this case out of that rule. We might go so far as to take the position that the Act of May 10, 1872, which was prior to the executive order creating this reservation, was a legal appropriation of the mineral lands of the United States for mining purposes and no others, and invoke the rule against counsel that no subsequent law or procla-

mation would be construed as embracing it, yet we do not think we need to invoke this principle.

The case of Leavenworth and Lawrence R. R. Co. vs. the U. S., in the 92nd U. S., 733, relied on by counsel at the argument, applies to agricultural lands, and as we have already endeavored to show, the rule would have no application whatever in a case involving the title to mineral lands, and that under no circumstances could the taking of mineral lands by the proper procedure curtain the right of selection by the Indians under the allotment act because mineral lands are not subject to the allotment act, and the reason given in the Leavenworth case, while it would be applicable to agricultural lands, would have no application whatever to mineral lands.

The case of Walker vs. Henshaw, relied upon by counsel for plaintiffs in error, was also a case in which it was sought to take a class of lands subject to allotment to the Indians and thus curtail their right of selection. The case arose before the passage of the mining acts by Congress and under a condition and policy so entirely different from that which has since that time governed in the determination of these questions that the case can have no application to the case at bar. No allotment can be made, under the Act of Congress opening the Colville Reservation, upon the portion of the reservation restored to the public domain, except to one class of persons, viz.: to Indians who are already located and residing thereon. And even this class of Indians are not permitted to make selections other than those upon which they reside. This provision was undoubtedly

prompted by the suggestion that the Indians had become attached to the localities in which they had been residing for a long time, and upon which they had improvements, that it would be unfair to compel them to leave the portion of the reservation restored to the public domain and make their selection upon that portion not restored. It is not contended that any Indians were located upon or had improvements upon the mineral lands claimed by the complainant. This is a complete answer to the argument of counsel that mineral entries should be suspended until the Indians had first made their selection, for the reasons that said mineral locations might interfere with the selection of the Indians.

The case of the United States vs. Carpenter in the 111 U. S., 347, relied upon by counsel at the argument, was where an attempt had been made to locate agricultural college scrip upon an Indian reservation which had been distinctly withdrawn from settlement by treaty, and is subject to the same criticism as the case last referred to.

The case of Bates vs. Clark, 95 U. S., page 204, relied upon by counsel for the defense at the argument, holds a principle that is against plaintiffs in error. That case decides that as soon as the Indians part with their title the lands cease to be Indian country without any further act of Congress or of the Executive Department of the Government. It will not be claimed that the Indians have any title to the portion of the Colville Reservation upon which defendant in error's mining claims are situated. The act of Congress, in the eighth section, distinctly states that no such title is recognized.

Mr. Justice Miller, in the case of Bates vs. Clark, in determining this question as to what is Indian country, says:

"The simple criterion is, that as to all the lands thus described, it was Indian country whenever the Indian title had not been extinguished; and it continued to be Indian country so long as the Indians had title to it, and no longer. As soon as they parted with the title, it ceased to be Indian country without any further act of Congress, unless by the treaty by which the Indians parted with their title, or by some act of Congress, a different rule was made applicable to the case."

We have but two cases decided by the Supreme Court of the United States in which it has been held that a mining location cannot be made upon an Indian reservation, and those were both cases where, by express provisions of the treaty between the Government and the Indian nation, it was expressly provided that no person should have such rights as would in effect enable them to make a location of a mining claim within the reservation.

We contend, that under the policy of the Government with reference to the development of its mineral resources, taken in connection with the meagre provisions by which the Colville Reservation was created, the utter absence or lack of stipulation for the exclusive possession on the part of the Indians, or prohibition against others than Indians going upon the reservation, all of this in view of the fact that the Department of the Interior has published to the world, through its official map made by authority of Congress, paid for out of the public treasury of the United States and sent out as an announcement of

the survey boundaries of the public lands of the United States, and the Indian reservation thereon, whereupon it appears that the land upon which the appellant's mining locations were made was not within any reservation, and all of this in connection with the act of Congress passed with the view of facilitating the development of mineral resources and railroad enterprises in this particular section of the country, which declared this reservation to be restored to the public domain, the land was subject to mineral location.

The plaintiffs below offered in evidence an official communication in the shape of a public notice, dated January 29, 1892, in which the Secretary of the Interior threatens all persons who shall go upon the portion of the Reservation restored to the public domain by the Act of Congress with certain punishment; to give the interpretation and force to this communication contended for by the defendant would in effect repeal the Act of Congress of May 10, 1872, under which mining claims are located upon the public domain.

We respectfully submit that the Secretary of the Interior has no such power conferred upon him by law and can no more affect the validity of the location of a mining claim made in conformity with and by authority of law, by such an edict, than any other citizen of the United States.

We know of no change in the conditions or laws since the decision of this question in the case of Collins vs. Bubb, which could lead to any different conclusion than was arrived at in that case.

The decision of Judge Hanford in this case, reported in the 87 Federal Reporter, page 154, seems to meet every argument advanced by the appellees, or by the Circuit Court of Appeals, and is a safe and sufficient basis upon which to rest a claim for the reversal of the judgment of the Court below.

Respectfully submitted,

W. B. HEYBURN,
L. A. DOHERTY,
Attorneys for Appellant.

[redacted]

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1900.

THE MOUNTAIN VIEW MINING AND MILLING COMPANY, APPELLANT,
v.
W. D. McFADDEN ET AL.
No. 162.

BRIEF FOR APPELLEES.

STATEMENT.

Appellant has pending in the U. S. Land Department an application for mineral patent upon a certain lode mining claim. During period of publication thereof appellees filed adverse claim thereto. This is an action brought by appellees in support of such adverse claim, under Section 2326, U. S. Rev. Stats. "to determine the question of the right of "possession." The action was originally commenced in the Superior Court of Stevens County, State of Washington, and removed thence upon appellant's petition into the U. S. Circuit Court for the District of Washing-

ton, Eastern Division. It involves the construction of the Acts of Congress approved July 1, 1892 (27 Stats. 62), entitled "An Act to provide for the opening of a part of the "Colville Reservation in the State of Washington and for "other purposes," and February 20, 1896 (29 Stats. 9), entitled "An Act to extend the mineral land laws of the "United States to the lands embraced in the north half "of the Colville Indian Reservation."

The appellant's mining locations were made *after* the Act of July 1, 1892, but preceding the Act of February 20, 1896, and the appellee's mining locations conflicting therewith were made on the latter date. At the trial the parties in effect stipulated (R. 39) that *if* the premises were in law subject to entry and mineral location prior to the passage of the Act of February 20, 1896, appellant is entitled, but if not so subject to entry and location prior to the date of such Act, the appellees are entitled. The Circuit Court held in favor of appellant (R. 40). That decision was reversed by the Circuit Court of Appeals (R. 70), Judge Gilbert dissenting only upon the question of jurisdiction (R. 81).

ARGUMENT.

I.

The Appeal Should be Dismissed.

We submit the cause is not properly before the Court, review being here sought by an appeal in what is admittedly an action at law.

The brief for appellant opens with the admission that "This case was tried in the court below as an action at "law." The record abundantly confirms this statement.

Thus the complaint (R. 1–6) distinctly pleads (par. 9) plaintiffs' (appellee's) quiet and rightful possession of the premises under legal location; the wrongful entry of defendant (appellant) and its ouster of plaintiffs therefrom with continued wrongful withholding of possession.

The case was tried upon an agreed statement of facts, under stipulation, which recites (R. 35):

"Come now the plaintiffs and defendant and expressly "waiving a jury herein, hereby stipulate that the follow- "ing shall be and are the agreed facts in this cause, and "that the same shall be taken for all purposes as the "findings of fact of the Court herein."

Thereon *judgment* was entered for defendant in the Circuit Court (R. 45), which was reversed in the Court of Appeals thus (R. 82):

"On consideration whereof it is now here ordered and "adjudged by this Court that the judgment of the said "Circuit Court in this cause be, and the same is, hereby "reversed with costs, and the cause is remanded to said "Circuit Court for further proceedings in conformity "with the opinion of this Court."

We should add that formal bill of exceptions was signed by the trial judge (R. 49–57).

Notwithstanding counsel's admission and this plain record clearly disclosing this to be an action at law, review of the *judgment* below is here sought by appeal. Appellant's counsel suggests that the Circuit Court of Appeals "treated it as a suit in equity, and we have "therefore been compelled to treat it as such upon this "appeal."

But this conclusion by no means follows. The ruling of the Court of Appeals here is based upon its prior decision in *Shoshone Mining Co.* v. *Rutter*, 87 Fed. Rep.

801. That decision was announced before this cause was decided in the Circuit Court, and hence from abundant caution the present appellees took the case to that Court both by writ of error and by appeal. Because of such dual method the appellant here moved dismissal of both the writ of error and appeal in that Court, and such motions were there denied (R. 72).

We submit the formal record is alone controlling. In the Federal courts, where the distinction between procedure at law and in equity is closely observed, a *judgment* cannot be entered in an equity cause nor a *decree* in an action at law. It is plain that court and parties hereto all joined in treating this cause as an action at law, and hence suggestions found in the opinion cannot control the judicial record. The complaint herein distinctly alleged plaintiffs' possession, and defendant's wrongful entry and ouster—the common elements of pleading in an action of ejectment.

In ruling directly upon this question this Court, in *Perego* v. *Dodge*, 163 U. S. 160, 165, said:

"Thus the determination of the right of possession as "between the parties is referred to a court of competent "jurisdiction, in aid of the Land Office, but the form of "action is not provided for by the statute; and, apparently, "an action at law or a suit in equity would lie, as either "might be appropriate under the particular circumstances, "an action to recover possession when plaintiff is out of "possession, and a suit to quiet title when he is in pos-"session."

Here the plaintiff was out of possession and so distinctly plead. Hence an action at law was the appropriate and adopted remedy. It was so treated by Court and parties, and from the *judgment* therein review could only be sought in this Court by writ of error. In *Johnson et al.*

v. *Munday*, 104 Fed. Rep., part 7, p. 594, the Circuit Court of Appeals for the Eighth Circuit has recently ruled that (syllabus)

"A suit in equity cannot be maintained in support of "an adverse claim filed against the patenting of a mining "claim to defendant, where complainant bases his claim "upon a purely legal title acquired by a purchase of the "property at sheriff's sale, the appropriate action being "one at law."

The practice in this regard is important and fundamental. The judiciary acts clearly continue the controlling distinction between review by writ of error or appeal and use of the appropriate form is essential to the power of review in this tribunal.

Deland v. *Platte County*, 155 U. S. 221.
Chase v. *United States*, 155 U. S. 489, 499.
Bucklin v. *United States*, 159 U. S. 680.

The appeal should hence be dismissed.

II.

Jurisdiction of Federal Courts Herein.

The primary question herein is (as always) the power of this Court to review the cause and dependent as of course upon proper method of removal thereof into this Court for final review. If we are correct in foregoing contention the pending appeal must be dismissed. If overruled therein, the question of jurisdiction in the courts below is next in order.

Beyond doubt the sole question presented upon the merits is clearly one of primary Federal cognizance, *i. e.*, the construction of the Congressional Acts of 1892 and

1896, cited *supra*. When the action was commenced the controlling decisions in the Ninth Circuit held an adverse claim suit brought under Sec. 2326, U. S. Rev. Stats., *per se*, within the jurisdiction of the Federal Courts, and wholly independent of any other Federal question. The complaint herein clearly disclosed this to be an action brought in support of such an adverse mining claim. Thereon the appellant filed petition for removal (R. 7), setting up therein (1) that the action was of the nature stated, and hence arising under the laws of the United States, and (2) involving construction of the Congressional Acts of 1892 and 1896, relating to the Colville Indian Reservation. The petition for removal was granted (R. 14), and our motion to remand thereafter denied by the Circuit Court. (R. Supplement.) The rule stated was still in force in the Ninth Circuit when this case was reviewed in the Circuit Court of Appeals, and reaffirmed in that Court's opinion herein (R. 72). After the cause was docketed here on Dec. 1, 1899, this Court in

Blackburn v. *Portland Mining Co.*, 175 U. S. 581;
Shoshone Mining Co. v. *Rutter et al.*, 177 U. S. 505,

overruled this doctrine. Hence upon the face of the complaint this case cannot be distinguished from these recent decisions denying such jurisdiction. Resort cannot be had to the petition for removal wherein is disclosed the second and controlling ground of Federal jurisdiction; nor to the stipulated facts which repeat the statement. But the brief of appellant's counsel pertinently suggests that as the Congressional acts of 1892 and 1896 are public statutes; as they clearly define the tract of country wherein they operate, and as the complaint as clearly describes the *locus* of the premises here in controversy, this Court *may* take judicial notice of such plain

geographical factors and readily find therefrom that the premises here in controversy do fall within the tract of country thus clearly described in those statutes. Having been taken into the Federal Court in January, 1897, and since kept there, and the case presenting a single question of law of undoubted Federal cognizance, to be ultimately determined in this Court in any event, these appellees may well be justified in indulging the earnest hope that this Court will take present jurisdiction of the cause (if the appeal be not dismissed on the ground first stated), and determine the important question presented. Under these circumstances we beg to add the suggestion that as well stated in *Greenleaf on Evidence*, 15 Ed., Vol. 1, Sec. 6, courts may take judicial notice *inter alia :*

" of the local divisions of their country, as into states, " provinces, counties, cities, towns, local parishes, or the " like, so far as political government is concerned or " affected; and of the relative positions of such local " divisions; but not of their precise boundaries, farther " than they may be described in public statutes."

And the foot-note thereto pertinently cites authorities which hold that courts will also take judicial notice whether a city or town is in the State, and if so, in what county. The complaint describes the locus of these mining claims as " situated on the north side of and about " one and one-quarter miles from the Columbia River, " and about two and one-half miles west of the town of " Northport in the County of Stevens, State of Washing- " ton * * * ," and reference to the United States public land map, aided by the description given in the Acts of 1892 and 1896, will readily disclose the premises here in dispute as located within such statutory description.

Should this suggestion be rejected we finally submit, that as the record so clearly discloses this single and controlling Federal question as alone involved, the cause may properly be remanded to the Circuit Court with liberty to the plaintiffs to there amend their complaint to thus affirmatively show this Federal question as was permitted under circumstances of like apparent merit in

Great Southern, &c., Hotel Co. v. *Jones*, 177 U. S. 449.

III.

The Merits.

The opinion of the Circuit Court of Appeals (R. 70–81) completely covers the entire case. It was rendered by Circuit Judge Ross, who, with accustomed accuracy and thoroughness of statement, reasons therefrom to unanswerable conclusion. Only the importance of the question presented and the large prospective values involved justifies amplification of the argument here.

A.

The Colville Indian Reservation was created by Executive order of President Grant on April 9, 1872. Thereby there was set apart as a reservation for certain named Indians, and such other Indians as the Government should thereafter locate thereon, a tract of country " bounded on the east and south by the Columbia River, " on the west by the Oknagon River and on the north " by the British possessions. * * *"

The power of the President to thus reserve for such public purpose, and the consequent exclusion of the land covered thereby from intrusion or appropriation by claim-

ants under the public land laws or otherwise, has been judicially recognized and settled from the earliest days.

Wilcox v. *Jackson*, 13 Pet. 498.
Grisar v. *McDowell*, 6 Wall. 363, 381.
Wolcott v. *Des Moines Nav. Co.*, 5 Wall. 681.
Leavenworth, &c., R. R. Co. v. *United States*, 92 U. S. 733, 747.

B.

By Act of August 19, 1890 (26 Stats. 355), Congress authorized the President to appoint a Commission to negotiate with the Indians for the cession of such portions of the reservation as they might be willing to so dispose of. That Commission agreed with the Indians for the cession of the north half of the reservation, and its report and agreement were transmitted to Congress by the President June 6, 1892, with draft of a bill to ratify the treaty so made. The report of the Commission and of the House Committee is copiously quoted in the opinion of the Court below, the House Committee therein recommending the ratification of the cession and passage of accompanying bill to create, among other reasons,

" A lessening of the dimensions of the Colville Reserva-
" tion, the planting of active, prosperous and well ordered
" white communities on every side of the Indians, the
" building of railroads, the creation of towns and cities,
" the opening of mines, and the consequent establishment
" of markets near at hand, etc."

And the report continues with amplified detail supporting these controlling public reasons for the action proposed. The bill, as submitted, to ratify the treated passed the House but was amended in the Senate and enacted as there passed on July 1, 1892, being entitled " An Act to

" provide for the opening of a part of the Colville reser-
" vation in the State of Washington and for other pur-
" poses."

The first section thereof provides:

"That subject to the reservations and allotment of
" lands in severalty to the individual members of the In-
" dians of the Colville Reservation in the State of Wash-
" ington herein provided for, all the following described
" tract or portion of said Colville Reservation, namely"
(giving the boundaries), " containing, by estimation, one
" million five hundred thousand acres, the same being a
" portion of the Colville Indian Reservation created by
" Executive order dated July 2, 1872, be, and is hereby,
" vacated and restored to the public domain, notwith-
" standing any Executive order or other proceeding where-
" by the same was set apart as a reservation for any In-
" dians or bands of Indians, AND THE SAME SHALL BE OPEN
" TO SETTLEMENT AND ENTRY BY THE PROCLAMATION OF THE
" PRESIDENT OF THE UNITED STATES AND SHALL BE DISPOSED
" OF UNDER THE GENERAL LAWS APPLICABLE TO THE DISPO-
" SITION OF PUBLIC LANDS IN THE STATE OF WASHINGTON."

Succeeding sections provide for such Indian allotments; disposal of all other lands under the public land laws; appropriating $30,000 for the precedent survey of the lands to be so allotted and those "to be vacated and re-
" stored to the public domain."

Immediately following the passage of this Act and on July 29, 1892, the Secretary of the Interior, by direction of the President, issued the following:

" PUBLIC NOTICE.

" Whereas, by Section one of the Act received by the
" President on June 20, 1892 (Pub. 92), entitled 'An Act
" 'to provide for the opening of a part of the Colville

" 'Indian Reservation in the State of Washington, and
" 'for other purposes,' it is provided: * * *

"And whereas, by Section four of said Act it is pro-
" vided: * * *

"And whereas, it is reliably reported that many per-
" sons have gone upon said reservation for the purpose
" of making entries or making mineral locations when
" said lands shall have been duly proclaimed to be
" opened to settlement and entry;

"And whereas, no proclamation has been or will be
" made until said lands shall have been sufficiently sur-
" veyed to—in the discretion of the President—warrant
" such opening with justice to all concerned:

"Now, therefore, notice is hereby given, that all en-
" tries, locations or settlements upon said reservation, as
" the same has heretofore been established, attempted to
" be made prior to the time of the opening thereof by
" the proclamation of the President yet to be issued
" under the provisions of Section one of said Act, are
" hereby declared to be illegal, and no person who has
" heretofore, or who shall hereafter, attempt to make such
" entries, locations or settlements prior to such opening
" by proclamation, will gain any advantage thereby, but
" on the contrary the preference will be given to those
" who legally enter upon said reservation after the same
" shall have been duly opened.

"The survey of said reservation has been ordered and
" will be completed as soon as possible, and proclamation
" will be thereafter duly made. It is intended that those
" abiding by the law shall be protected by it, and not
" those who disregard it and seek thereby to obtain an
" undue advantage over their fellow-citizens; and all
" persons now upon said reservation without express au-
" thority are warned to leave the same without delay.

"This notice is given by direction of the President."

Long prior to the President's proclamation opening this land to appropriation under the public land laws, and in full face of this public warning, the appellant's answer and the stipulated facts herein (R. 20, 36) admit that on

October 16, 1895, one Collins went upon the premises in controversy and made and, October 21, 1895, recorded the location of the Mountain View lode claim whereunder by mesne conveyances the appellant claims.

The validity of such location is here maintained by appellant upon the ground that the mineral lands were immediately opened by the Act of July 1, 1892, *supra*, without awaiting the proclamation of the President therein prescribed.

Notwithstanding this assertion (which is the sole foundation of appellant's claim) it appears that on February 20, 1896 (29 Stat. 10), and preceding such proclamation, Congress passed an Act entitled " An Act to extend the " mineral land laws of the United States to lands embraced " in the north half of the Colville Indian Reservation," by which it was declared

" THAT THE MINERAL LAND LAWS OF THE UNITED STATES BE " AND ARE HEREBY EXTENDED SO AS TO APPLY TO ALL LANDS "

described in Section one of the original Act of July 1, 1892.

The general Act of March 3, 1875 (18 Stats. 482), grants to railroads the right of way through " the public lands " of the United States," but further provides that the Act shall not apply " to any lands within the limits of any " military, park or Indian reservation, or other lands spe- " cially reserved from sale * * *."

Therefore Congress deemed it necessary to pass, on March 6, 1896 (29 Stats. 44), an Act entitled " An Act " granting to the Columbia and Red Mountain Railway " Company a right of way through the Colville Reser- " vation in the State of Washington and for other pur- " poses " whereby such right of way was granted,

" together with all the rights granted to railroads by the " 'Act of Congress entitled 'An Act granting to railroads " 'a rightof way through the public lands of the United " 'States,' approved March 3, 1875, and for the purposes " of this grant, and the construction of said railway, all " the provisions of said Act are hereby declared to be " applicable thereto to the same extent as though *the " lands in said reservation were open to settlement and " sale.*"

The right of way as described in the Act ran directly through the lands which by the Act of July 1, 1892, were to be opened by the President's future proclamation to disposal " under the general laws applicable to the dispo- " sition of public lands in the State of Washington."

C.

The Act of July 1, 1892.

The Circuit Court herein reaffirms its opinion in *Collins* v. *Bubb* (73 *Fed. Rep.* 735), to the point that whilst the Act of 1892 provided for the President's proclamation antecedent to "settlement and entry" upon the land restored, these terms could not be applied to a mining claim which is initiated by "location." But purchase of mineral lands from the United States is accomplished by payment and entry, and it cannot be said that lands are subject to location, which are not also then subject to application for patent, purchase and entry under the mining law. We may add that if the term "entry" be read in the technical way suggested in *Collins* v. *Bubb*, then the land would be open to selection by the State in satisfaction of the various grants made to her for internal improvements or to "location" by the various classes of scrip, because in neither instance, in land nomenclature,

is the technical term "entry" applied thereto, nor are they based upon "settlement."

It is impossible to say that any land is open to location which is not also and at the same time open to application, publication, purchase and *entry* under the United States mineral land laws. Taking the Act of 1892 by its language alone, it is plain that whilst the land was restored to the public domain, yet it was not to be opened either to settlement or to entry until the proclamation of the President. Upon such proclamation it was then to be "disposed of under the general laws applicable to the "disposition of public lands in the State of Washington." The "general laws" unquestionably embrace the mineral land laws, and it is equally certain that such mineral land laws were applicable to valuable mineral lands in the State of Washington. If the Circuit Court was right in holding that the land was open to location under the mineral laws, then it must follow that it was equally then (after the Act of 1892) open also to application for patent, purchase and *entry* under such laws. If that be true then the Act of 1892, on its face is extended far beyond both its letter and intent. We have not before us the arguments on which the learned judge reached his conclusion in *Collins* v. *Bubb*, but it seems to us he must have overlooked the important and controlling fact that the land must be open to entry by the mineral claimant, or it is not open to location by him. We do not think any case can be found holding that land may be open to location under the mining laws which is not at the same time open to entry and purchase by the mineral applicant. If the land is reserved, it is withheld from location as well as entry, and if it is not so reserved, then it is open both to location and entry. The principle is too plain to require citation of authority in its support.

Following the cardinal rule of construction in seeking the intention of Congress, reasonable interpretation of the language employed by the Act of 1892 brings it in full accord with legislative precedent of *then* recent date, to wit, that, in the opening of large bodies of land to disposal, the United States sought to fix a future date whereby the general public would have equal opportunity. This was done in the opening of Oklahoma and the subsequent opening of the Cherokee strip. The intention of Congress in this regard, as expressed in the Act of 1892, to adopt and apply the same policy in respect to the Colville Indian Reservation, is apparent. The policy thus expressed must be here applied to all the lands and to all classes of claimants, unless the intention to except some lands and some classes of claimants is made clear in the Act itself. None such can be found in the Act of 1892. The Act, whilst in terms of present tense vacated the former reservation and restored to the public domain the body of lands described in the Act, is equally clear and effective in providing that, as a part of the public domain, the land should not be open to settlement and entry until and by the proclamation of the President. It should be further noted that the opening of the reservation and disposal of the restored lands under the general land laws is all made dependent upon the precedent proclamation of the President. The Act opens with an express limitation. *All* lands within the part of the reservation described are not restored to the public domain, but the language is "that subject to the reservations and allotment of lands "in severalty to the individual members of the Indians of "the Colville Reservation," the lands described are "re-"stored to the public domain * * *." Had the Act stopped here the conclusion of the Circuit Court might well follow, but restoration of land to the public domain,

with an express statutory declaration that it should not be open to settlement and entry until the proclamation of the President when it should then be "disposed of under "the general laws applicable to the disposition of public "lands in the State of Washington" creates, in the first instance, an exception of all lands reserved by allotment to the Indians, and, in the second instance, makes initiation of right of disposal under any law subordinate to the precedent proclamation of the President. If this is not so and the words "settlement "and entry" have the legal effect given them by the Circuit Court, it must follow that claims under public land laws, which are not initiated by settlement or technical entry, could from and after the passage of the Act of 1892 take effect upon the lands described, anterior to any proclamation by the President. As suggested above State selections and scrip locations are abundantly illustrative of our meaning. And in such view if the President's proclamation never came, such locations and selections would be legal from the date of their tender.

This line of reasoning, it seems to us, determines that the Circuit Court takes too narrow view of the Act of 1892, both in restricting the language employed and in ignoring the policy of legislation which was well understood and enforced elsewhere, when the Act of 1892 was passed. Along the same line of policy it may be suggested that Congress purposely postponed the opening of the reservation to the occupation of the whites until the Indians had been gathered in from the vast area restored—a million and a half acres—and collected together, so that they could be looked after and possible opportunity for clash or trouble thus avoided, prior to the formal opening of the reservation by the President's proclamation. The facts recited on pages 737–738 of Judge Hanford's opinion

in *Collins* v. *Bubb*, gives strong color and support to this suggestion. As there recited, the treaty negotiations with the Indians, and which the House bill simply sought to confirm or ratify, were swept aside by the Senate, and in lieu thereof the Act of 1892, as it now appears was adopted. The Act makes no reference to any treaty, but summarily restores the entire north half of the reservation to the public domain, subject to the reservation and allotments of lands to the Indians, and makes provision for allotment to the Indians out of the lands thus restored after they have been surveyed. Section 4 of the Act indicates an additional reason for requiring the Executive proclamation prior to the opening of the reservation and general disposal under the general laws applicable to the disposition of public lands in the State of Washington, to wit, the prior survey thereof.

These suggestions unite in demonstrating that the dominant thought and purpose of Congress was to restrain the whites from entering upon the reservation for any purpose until the time fixed therefor by the President's proclamation. There is nothing said in the Act with regard to the mineral lands, and no suggestion therein that any different rule was to be applied to them with respect to the time when the reservation could be entered for mining purposes. The Circuit Court in reaching its conclusion loses sight of one plain fundamental fact, to wit, that a reservation for Indian purposes *excludes* physical entry or occupation by the whites for any purpose. Such is the trend of all public land legislation. The pre-emption law forbade it; the homestead law as originally passed and now existing authorizes settlement and entry only upon lands hitherto subject to settlement and entry under the pre-emption law; the general railroad right of way Act of March 13, 1875, expressly ex-

cludes the grant of right of way therein made from application to any Indian reservation. In short, such a reservation stands protected from adverse occupation or appropriation by positive prohibitory statutes.

Now the Act of 1892, even in using words of present tense, in restoring this land to the public domain, expressed a most clear intention that it should not be subject to *disposal* as public land, until the prior proclamation of the President, which proclamation should declare the time, and the first time, when the land "shall be open to "settlement and entry." The Circuit Court ignores the established definition of the term "public lands" as fixed in *Newhall* v. *Sanger* (92 U. S.), to wit, such land as is open to sale or other disposition under general laws. Yet this same definition has been since reaffirmed in the following cases:

Bardon v. *N. P. R.R. Co.*, 145 *U. S.* 535, 538.
Mann v. *Tacoma Land Co.*, 153 *U. S.* 273, 284.
Doolan v. *Carr*, 125 *U. S.* 618, 632.

Lands may be part of the public domain, which are not subject to disposal under general laws, and hence are not public lands in the legal sense contemplated by the decisions of this Court cited *supra*.

Thus in respect to Alaska, the Act of July 27, 1868 (15 Stats. 240), provided:

"That the laws of the United States relating to cus-
"toms, commerce and navigation be, and the same are
"hereby, extended to and over all the mainland, islands
"and waters of the territory ceded to the United States
"by the Emperor of Russia by treaty concluded at
"Washington on the thirtieth day of March, anno
"Domini eighteen hundred and sixty-seven, so far as
"same may be applicable thereto."

None of the land laws of the United States were extended to Alaska in any form until by the Act of March 17, 1884 (23 Stats. 24), providing a civil government for Alaska, it was provided, Section 8,

"and the laws of the United States relating to mining "claims, and the rights incident thereto, shall, from and "after the passage of this act, be in full force and effect "in said district, under the administration thereof herein "provided for, subject to such regulations as may be "made by the Secretary of the Interior approved by the "President. *Provided*, That the Indians or other per- "sons in said district shall not be disturbed in the pos- "session of any lands actually in their use or occupation "or now claimed by them, but the terms under which "such persons may acquire title to such lands is reserved "for future legislation by Congress."

This legislation extended the land laws as to mineral lands, and simply condoned trespass by way of occupation as to all other lands, investing the parties in such occupation with no legal rights whatsoever.

No further extension of the land laws was made to Alaska until in the Act of March 3, 1891, "To repeal the "timber culture law," etc. (26 Stats. p. 1095), wherein it was provided (p. 1100) that citizens of the United States "now or hereafter in possession of and occupying public "lands in Alaska for the purpose of trade or manufac- "ture, may purchase not exceeding one hundred and "sixty acres, to be taken as near as practicable in a square "form, of such land at two dollars and fifty cents per "acre."

By Section 14, this purchase is prohibited as to land containing gold or precious metals, or any town site.

By Act of May 14, 1898 (30 Stats. 409), Congress extended the homestead laws and provided for railroad

rights of way, &c., in Alaska, under special and restrictive terms wholly dissimilar to the general public law on those subjects applicable to the public lands in the United States proper.

And we take it that the former Crown lands in the Hawaiian Islands have become, by the annexation of the Islands to the United States, part of the public *domain* of the United States. This is so in the nature of things, because the Sovereign is the owner. Yet no one would contend that the former Crown lands in those Islands, because they have come within the public domain and ownership of the United States, are now subject to the general land laws of the United States. So with respect to Porto Rico, and what may be expected in the Philippines, where there are vast areas undoubtedly held without title from the former sovereign, and on their cession to the United States have now become part of the public domain of this Government.

All this is cited as merely illustrative of both the power vested in Congress and its exercise, whereby public domain may be in the ownership of the United States, and yet not subject to disposal, except at the time and under the conditions Congress may expressly prescribe. Hence, it must be true that the Act of 1892, in restoring this land to the public domain did *not* open it to sale and settlement until the Executive act occurred, to wit., the President's proclamation, which the statute required.

Judicial decisions confirm this view.

April 19, 1874 (18 Stats. 36) Congress passed an Act entitled:

"An Act to ratify an agreement with certain Ute In-
" dians in Colorado," etc. The Act recites the treaty with the Ute Indians made September 13, 1873. Article 1 thereof provides that—

"The confederate band of the Ute Nation hereby re-
"linquishes to the United States all right, title and
"claim and interest in and to the following described
"portion of the reservation heretofore conveyed to them
"by the United States."

Article 7 provides:

"This agreement is subject to ratification or rejection
"by the Congress of the United States, and of the Presi-
"dent."

And Section 1, of the Act of August 29, 1874, *supra*, provides that this agreement "is hereby ratified and con-
"firmed."

In *Kendall* v. *San Juan Silver Mining Company*, 144 U. S. 658, there was presented the question of a mineral location made before the passage of the Act of 1874, ratifying this treaty, and a conflicting mineral location made *after* such ratification. The Court held, page 665:

"The reservation of the premises in controversy by
"force of the Indian Treaty was extinguished April 29,
"1874. On that date the premises in controversy were
"opened to location * * *."

It will be observed that the Act of April 29, 1874, was the final ratification and confirmation of the treaty, and the Act contains no words of limitation withholding the operation of the general land laws from the territory ceded *after* its date.

This case is important in determining the rights of parties locating before and after the removal of the Indian reservation. It in effect holds that a location made on land not subject thereto is a nullity, and relocation validly made by new parties must be recognized if the original locator has not in meantime, and before such relocation

renewed his original and void location at a time when he could lawfully do so.

The case of *Noonan* v. *Caledonia Mining Company*, 121 U. S. 393, is likewise in point. There the land involved was covered by the treaty with the Sioux, and held not to be open to mineral location until February 28, 1877, the date of the Act (19 Stats. 254) ratifying and confirming the agreement with the Indians for the cession of the land to the United States without requirement of any Executive proclamation to give such cession and Act effect. In that case, however, the original locator, whose location was illegal because made prior to the Act of 1877, after the passage of the Act, renewed his location before the interposition of an adverse claim.

In this connection we call attention to *Smith* v. *Townsend*, 148 U. S. p. 490. That case involved the Act of March 1, 1889, ratifying an agreement with the Creek Indians in the Indian Territory, whereby a large body of their lands had been ceded to the United States, but the Act distinctly provided that they should not be entered upon for settlement until the President's proclamation. It is true that this Act limited their disposal to homestead entry, but the Court discusses in a very broad way the effect of this legislation, and the case closely touches upon the one at bar.

The word "entry" has, of course, a technical meaning which is, in effect, that it is the proceeding at the local Land Office under the statute, by which a person acquires either initiative right (as under the homestead law, to be followed by compliance with law in matter of settlement, etc.,) or a final right upon payment of the purchase price under a statute providing for sales, or making the final proof required under the homestead law. But in the Act of 1892, the word "entry" is not used as restricted

to the homestead law, but the language is general, to wit, "settlement and entry," and is fortified by the further express direction that after the President's proclamation shall have been published, which opens the land, same shall be disposed of under the general laws applicable to disposition of public lands in the State of Washington. This includes all laws authorizing the location of scrip, State selections, etc., as well as original homestead entries—the making of additional homestead entries—the mineral laws and entry of town-sites. The whole body of the general law is manifestly postponed in its application until after the proclamation. It hence seems to us impossible to say that this provision for disposal under the general laws does not cover the mineral land law as well.

D.

The Act of February 20, 1896.

At the first session of the 54th Congress, Senator Wilson of Washington, on January 16, 1896 (Cong. Rec. 725), introduced a bill, Senate 1591, "to extend the mineral land laws of the United States to lands embraced in the north half of the Colville Reservation;" which was read twice by its title and referred to the Committee on Indian Affairs.

On January 20, 1896 (Cong. Rec. 850), Mr. Doolittle, the member from Washington, introduced a similar bill in the House—H. R. 4462.

The Senate bill was pressed to passage.

The report of the Senate Committee on Indian Affairs (No. 163, 54th Cong. 1st Sess.), was made on February 4, 1896, by Senator Wilson from that Committee. Same contains the recommendation from the Interior Depart-

ment on the bill referred to it for opinion, including an amendment suggested by the Commissioner of Indian Affairs, excluding from the proposed operation of the bill certain lands occupied for Indian school purposes.

On February 5, 1896 (Cong. Rec. 54th Cong., 1st. Sess., pages 1319–1320), it appears that Senator Wilson called up the bill for consideration in the Senate, and in reply to an inquiry from Senator Palmer as to the manner in which the rights of the Indians were protected by the bill, Senator Wilson said :

" *Mr. President*, Some four years ago Congress passed " a bill opening the north half of the Colville Indian Res- " ervation, and providing for a survey and allotment. " The Indians are all located upon the south half of the " reservation, having now about a million and a half " acres. An appropriation was made for a survey, but " owing to the vast amount of work before the Commis- " sioner of the General Land Office he never has been able " to examine and approve the surveys which have been " made.

" Upon the discovery of valuable mineral lands in what " is known as British Columbia, it was supposed that the " mineral zone extended across into this reservation. No " Indian can take up and develop mineral land unless he is " a citizen of the United States.

" The proposition *now* is, and it has been favorably " reported by the Secretary of the Interior, the Com- " missioner of Indian Affairs, and the Commissioner of " the General Land Office, to allow the prospectors to go " in there and locate those lands; and unless they are " permitted to do so at an early day, it will take the Army " of the United States to keep them out, and ultimately " result in no good. The passage of this bill is desired " by all the people in the West. It does the Indian no " harm. I should be as quick as any Senator to protect " every right the Indian has, and in trying to get him to " locate upon agricultural land; but this land is absolutely

" valueless except for mineral purposes. It never can be " surveyed, being a mountainous country. There is no " objection to the passage of the bill on the part of the " Departments who have fully examined the matter."

Subsequent discussion by Senator Wilson went entirely to show that the Indians had no right whatever to the land, but foregoing is all that is important with respect to the Senator's statement of the scope of the bill, except his concluding statement which was—

"The bill is of great importance to the white people of " my section of the country, and it will be ultimately im- " possible to keep them out of there, for as soon as the " weather grows warmer they are going in. I have en- " deavored to hasten the passage of the bill upon the " floor of the Senate, and I hope there will be no objec- " tion to it."

And on this explanation the bill passed in the Senate without further discussion.

On February 15, 1896 (Cong. Rec. 54th Cong., 1st. Sess., p. 1751) Mr. Doolittle (who had introduced the House bill of like tenor) called up the Senate bill in the House. After stating the action in the Senate, the favorable report thereon by the Committee of Indian Affairs of the House, and the like favorable recommendation of the Interior Department, Mr. Doolittle said:

" Mr. Speaker, The reservation to which this bill relates " is in the State of Washington. There is legislation pend- " ing now having for its purpose the opening of the reser- " vation. That has been going on for some time. There " are well-known mineral lands in the reservation, and " this provides that the mineral lands may be segregated " from the great body of the lands.

" Mr. SAYERS. What reservation does this refer to?

" Mr. DOOLITTLE. The Colville Reservation.

"Mr. McMillan. I will ask the gentleman if the pur-
" pose of segregating the lands—the mineral lands—is for
" the purpose of ascertaining their value?

"Mr. Doolittle. Oh, no; it is only that these mineral
" lands, which are recognized as quite valuable, shall be
" placed under the well-known mineral-land laws of the
" United States. These lands are in the north half of the
" reservation.

"Mr. McMillan. Is this land that has been bought
" from the Indians by the United States?

"Mr. Doolittle. No; the reservation is being opened
" and the lands are to be allotted. It was an Executive-
" order reservation, and not a result of legislation.

"It seems to me that it ought to be satisfactory to the
" House when all the officials of the Department—the
" Secretary of the Interior and all—have agreed to it and
" recommend it.

"Mr. Boatner. I think we will do little harm when we
" accept the recommendation of the Secretary."

Thereupon the bill passed without further discussion. It appears as a law approved February 20, 1896, in 29 Stats., p. 9, and is there entitled:

"An Act to extend the mineral land laws of the United
" States to lands embraced in the north half of the Col-
" ville Indian Reservation."

Its pertinent language is:

"That the mineral land laws of the United States *be*,
" *and are hereby*, extended so as to apply to all lands em-
" braced within the Colville Indian Reservation, namely:"

Thence follows the description of the land in the precise language of the Act of 1892, *supra*, with a proviso that it should not apply to certain lands occupied for school purposes. The proviso has no effect upon the construction of the Act with reference to the *time* when

the lands embraced within this reservation became lawfully subject to mineral exploration, occupation, entry, and patent.

We quote the discussion in Congress not as controlling the interpretation of the Act of 1896, but as giving its legislative history, and the clear understanding of the men who secured its passage and were most deeply concerned therein on behalf of their constituents. Neither the Act, nor a word in the reports of the committees or in debate thereon, discloses any understanding indulged by either the Executive or Congress that the prior Act of 1892 had by force of its own provisions, opened this land to exploration, location and purchase under the mining laws.

The opinion of the Circuit Court of Appeals herein reasons with clearness and correctness to the conclusions (1) that the cotemporaneous and constant Executive interpretation of the Act of 1892 correctly ruled the land *not* so open to mineral location and entry, and (2) that the Act of 1896, dealing only in words of present and future operation disclosed no purpose to validate any prior attempts in that direction. The opinion also clearly reasons upon principle and authority that this declaratory Act of 1896 must be construed *in pari materia* with the former Act.

Both with respect to the right of way Act, *supra*, and the Act of 1896, extending the mineral laws to the lands embraced in the north half of the Colville Reservation, the Circuit Court's suggestion that this additional legislation should be construed as having retroactive effect, seems to us to violate all settled canons of construction.

Taking the Act of 1896 by its title, by the debate thereon (set forth in detail, *supra*), and by the legal effect of its language, it must certainly follow that the Act of 1896

speaks only from its date. In reaching a contrary result, the Circuit Court unconsciously indulges in plain contradiction. Thus it treats the Act of 1892 by its use of the words "be and is hereby vacated and restored to the "public domain," as operative from its date and opening the lands restored to mineral location and claim. Yet the Act of 1896 uses the same form of language, to wit, that the mineral land laws of the United States *be and are hereby* extended so as to apply to all land embraced within the Colville Indian Reservation, namely, etc. In other words, the Circuit Judge gave the Act of 1892 immediate and present operation, and the Act of 1896, in the use of the same words of present tense, past and retroactive operation. In short, found in the earlier Act they mean one thing, and in the later Act they mean another. But this is verbal criticism. On principle, the Act of 1896 has no retroactive operation, because—

1st. It does not, by expression or intendment seek to have retroactive effect. It is framed in language which applies to the present and the future, and is so clear upon that point as not to need interpretation. Its intention is clear upon its face.

Sutherland on Statutory Construction, Secs. 237 *to* 241.

2d. Retroactive effect is never given unless the language and intention be so plain as to wholly exclude only the future application of the statute. This is fully and well discussed in *Endlich on the Interpretation of Statutes, Secs.* 291–294.

3d. Neither by expression nor intendment does the Act of 1896 seek to *declare* the meaning of the former Act of 1892 as opening the mineral lands to location and entry. Had it sought to have done so, it is plain that dif-

ferent language would have been employed. It is no answer to this suggestion to say that the attention of the legislature may not have been called to the fact that mineral locations had been made on the assumed authority of the Act of 1892. We must take the law as we find it, and it can neither be changed by interpolation or surmise, in order to give it retroactive effect.

The Circuit Court indulged the presumption that the Act of 1896 does not show a disposition on the part of Congress to acquiesce in the rulings of the Interior Department, but rather a continuity of purpose to remove the barriers in the way of mining and construction of highways. This does not logically follow from the language of the Act of 1896 nor its interpretation by established rules. On the contrary, if it was the purpose of Congress, in the Act of 1896, to declare the Executive construction of the Act of 1892 erroneous, and to which its attention was clearly called, it was necessarily the duty of Congress to say so in such language as would have compelled its new enactment to be read as having retroactive effect. The opinion assumes in this suggestion, knowledge on the part of Congress as to the practical construction and effect given by the Executive Department to the Act of 1892. Hence it must necessarily follow that if Congress intended to correct by new enactment this Departmental construction, it was necessary to say so plainly, and not to use solely the language "be and are "hereby," which has reference only to the present and the future, and not to the past.

It is certainly true that the public at large accepted the construction of the Act of 1892 as made by the Interior Department, and obeyed its warnings against making physical entry upon the reservation prior to the President's proclamation. Parties who desired to enter law-

fully and engage in mining operations undoubtedly initiated the movement which resulted in the passage of the Act of 1896. Taking the language of that Act, and the debate which occurred in both houses on its passage, it is impossible to say that Congress expected or intended that the new Act should have retroactive operation so as to validate claims initiated by trespass upon the reservation before the President's proclamation opening the lands to disposal under the general laws applicable thereto in the State of Washington.

Manifestly, prospectors and miners who were seeking to get into the reservation did not ask Congress to enact curative legislation which would protect parties who had already gone in, made their locations, and taken their chances.

Through a long chain of decisions, the United States Supreme Court has declared that the words "be and is "hereby granted" are effective *in presenti* only. Certainly the same rule must be applied to the language of the Act of 1896, which declares that the mineral laws "be "and are hereby extended," etc. In neither case is it possible to give such language retroactive effect.

The Circuit Court also gives a most peculiar construction to the subsequent Act of Congress of March 6, 1896, *supra*, granting a right of way across this reservation for railroad purposes.

Bear in mind that the original Act of 1892 provided " that such allotted lands shall be subject to the laws of " eminent domain of the State of Washington, and shall, " when conveyed in fee simple to the allottees or their " heirs, be subject to taxation as other property in said " State."

Now these allotments, here provided for, were to be made under the Act of February 8, 1887, as amended by

the Act of February 28, 1891. Turning to Section 10 of the Act of February 8, 1887 (24 Stats. 388), it will be seen that Congress provided that nothing in the Act shall "be "so construed as to affect the right and power of Con- "gress to grant the right of way through any lands "granted to an Indian or a tribe of Indians, for railroads "or other highways or telegraph lines for the public use, "or to condemn such lands to public uses, upon making "just compensation."

Now this provision in the Act of 1892 subjecting the lands of allottees to the laws of eminent domain of the State of Washington is peculiar, because we know of no other instance in which this reserved power under Section 10 of the general allotting Act, *supra*, has been surrendered by Congress to any of the States. Notwithstanding this, however, before the President's proclamation opening up these lands under the Act of 1892, Congress *did* regard it necessary to pass a special Act granting a right of way to a railroad company thereover. If the construction given the Act of 1892 by the Circuit Court is correct, then the general right of way Act applied to the unallotted lands in the restored part of this reservation, as public lands, and the Act of 1892 gave such company the right to acquire, by condemnation, such right of way through any Indian allotments therein. In such view, the special railroad Act of March 6, 1896, was thus wholly unnecessary. Yet Congress thought otherwise, and certainly this special right of way act was again declaratory of the meaning attached by Congress to the former Act of 1892, in restricting the operation of the general public land laws, including the general railroad right of way Act, to the time when the President should, by his subsequent proclamation, declare the land open for disposal thereunder.

E.

Some additional suggestions made in the brief for appellants require reply.

1. It is said that this land was open to mineral location and claim *prior* to the Indian reservation created by the President's order of April 9, 1872, and hence on revocation thereof by the Act of July 1, 1892, it was thereby restored to its original status.

Not so. Such would have been the result but for the express provisions of the Act limiting the *time* when the public land laws should again become operative thereon, *i. e.*, after and upon the President's proclamation. Before such Indian Reservation was created the land was equally open to "settlement," yet the Act of 1892 expressly forbade such "settlement" until after the Proclamation opening the land thereto. While the land was unsurveyed, settlement could be made thereon under the pre-emption law, prior to its reservation, and while that law was repealed by the Act of March 3, 1891, settlement under the homestead law has been permitted upon unsurveyed land since the Act of May 14, 1880 (21 Stats. 140). It is hence erroneous to say (as does counsel), that mining claims and rights of way for railroads may be acquired upon unsurveyed public lands while homestead entries may not. "Settlement" is and has long been a method of initiating homestead claim upon unsurveyed land, and to assert that the Act of 1892, expressly prohibited such "settlement," and yet permitted mineral occupation, is to argue a plain *non sequitur*.

2. The contention that the Public Land Map published in 1895, in showing the north half of this reservation as part of the public domain was in legal effect the equivalent of the prescribed proclamation of the President opening these lands to settlement and entry, and to consequent

disposition under the general public land laws, is unsound. The *fact* is the President's formal proclamation was so issued on April 10, 1900 (Session Laws 1899–1900, Pamphlet, Proclamations, p. 21, No. 12), and contains an addenda giving "schedule of lands allotted to the Indians "in restored portion of Colville Indian Reservation, "Washington, and withheld from settlement and entry "by proclamation of the President dated April 10, 1900."

Thus the President faithfully carried out the expressed will of Congress (1) in surveying the lands; (2) in allotting therefrom to the Indians, and (3) restoring the remaining non-mineral lands to "settlement and entry" under the general public land laws, the Act of 1896 *supra*, having (with exception of certain tracts), from the date of that Act applied the mining laws to the mineral lands therein.

3. Counsel strenously contends that any act indicative of *intent* is sufficient to effect either Executive reservation or restoration of the public lands. Applying that suggestion, it may well be urged that the official public notice, issued by the President's order, in July, 1892 (quoted *supra*) was an effective exercise of undoubted Executive power, and hence when in October, 1895, appellant's grantor, in defiance thereof, entered upon this Reservation and made his pretended mineral location, it was a void act, not only because forbidden by the express provisions of the Act of 1892, but by reason of authoritative Executive action, and notice given in July, 1892, whereby such intrusion was forbidden.

4. Counsel is mistaken in assuming that the Act of February 28, 1877 (19 Stats. 254), ratifying the cession by the Sioux of the Black Hills country in South Dakota, required any proclamation by the President antecedent to its opening. The Act contains no such provision; was

operative from its date, and *hence* was so applied in *Noonan* v. *Caledonia Mining Company*, 121 *U. S.* 401.

5. Counsel misapprehends the force of *Bates* v. *Clark*, 95 U. S. p. 204, cited below. The case involved the question, what is Indian country, and holds that when the Indians parted with the title it ceased to be Indian country "without any further act of Congress, unless by "the treaty by which the Indians parted with their title or "by some act of Congress, a different rule was made ap- "plicable to the case." The principle thus established is analogus to the case at bar because the Act of 1892 in vacating the reservation and restoring the land to the public domain *did* apply a different rule whereby disposal of the land as part of the public domain was conditioned on the precedent proclamation of the President, and was not effective from its date as would have been the case *if* such special provision had not been made. The case applies a cognate principle and is cited only as illustrative thereof.

6. Appellant and the locator through whom it claims were bound to know the *law*, and in addition to the public statute, the Executive notice and warning had long been public. The great body of the citizens desired to enter this reservation, but respected the law while clamoring for requisite legislation from Congress opening these lands to impartial acquisition by all. No equities can be invoked in appellant's favor, the suggestions of its counsel notwithstanding.

We submit the Circuit Court of Appeals correctly ruled the question here presented and that its judgment should be affirmed.

Respectfully submitted.

A. B. BROWNE,
ALEX. BRITTON,
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Attorneys for Appellees.

No. 162.
Reply Brf. of Britton, Brooks & Stoll for Appellee

Office Supreme Court U. S.
FILED
FEB 28 1901
JAMES H. MCKENNEY,

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1900.

Filed Feb. 28, 1901.

MOUNTAIN VIEW MINING & MILLING CO.,
APPELLANT,
v.
W. D. McFADDEN ET AL.
No. 162.

MEMORANDUM SUBMITTED BY COUNSEL FOR APPELLEE.

At page 7 of brief for appellant, counsel state:

"A great many mining locations were made upon the "portion of the reservation which was declared to have "been restored to the public domain by the Act of July "1, 1892, and many of those locations have gone to "patent."

If by this statement counsel mean to imply that patents have so issued based upon locations made *prior* to the Act of February 20, 1896, opening these lands to mineral location and entry, the statement is incorrect.

From examination made in the General Land Office, we find that out of eighty-nine mineral entries of this "Col-

"ville Series" which have been patented, eighty-seven are based upon locations made *after* passage of the Act of 1896; one is based upon an original location made prior, and an amended location made subsequent to that Act—the latter location giving validity to the claim, and but *one* based upon a location made prior to the Act of 1896. Such single instance covers the first entry of a mining claim within the Reservation. The local officers in reporting same failed to observe the Commissioner's direction to specially note such cases as of the "Colville "Series," and hence it easily happened that the Examiner here overlooked the fact and locus of the entry, and hence patent was issued through such inadvertence. We recite the facts only to properly answer counsel's statement and to demonstrate the consistent attitude of the U. S. Land Department in its interpretation and enforcement of the Acts of 1892 and 1896, relating to these Colville Reservation lands.

A. B. BROWNE,
ALEX. BRITTON,
W. T. STOLL,
Attorneys for Appellees.

Supreme Court of the United States.

No. 162.—October Term, 1900.

The Mountain View Mining and Milling Company, Appellant, *vs.* W. D. McFadden, David O'Neil, Charles W. Vedder, and W. E. Harris.	Appeal from the United States Circuit Court of Appeals for the Ninth Circuit.

[March 25, 1901.]

Mr. Chief Justice Fuller delivered the opinion of the Court:

The Mountain View Mining and Milling Company had made application for a patent on a certain lode mining claim in the land office at Spokane, Washington, against which McFadden and others duly filed their protest and adverse claim, and thereupon brought this action "in aid of their said adverse claim, and to determine the right of possession," in the Superior Court of Stevens County, Washington, which was removed on the mining company's petition into the Circuit Court of the United States for the District of Washington, but not on the ground of diverse citizenship. Plaintiffs moved to remand the cause, and the motion was denied.

The petition for removal set up "that the controversy herein is a suit of a civil nature arising under the Constitution and laws of the United States, brought in pursuance of the provisions of section 2326 of the Revised Statutes of the United States, providing for the filing of adverse claims against the application for patent for mining claims, and the bringing of suits in support of said adverse claims."

The petition also set forth that the construction of two acts of Congress was involved, namely, an act approved July 1, 1892, (27 Stat. 62,) entitled "An act to provide for the opening of a part of the Colville Reservation, in the State of Washington, and for other purposes," and an act of February 20, 1896, (29 Stat. 9,) entitled "An act to extend the mineral land laws of the United States to the lands embraced in the north half of the Colville Indian Reservation." But the jurisdiction of the Circuit Court on removal depended on plaintiffs' statement of their own claim, and that only disclosed an action brought in support of an adverse mining claim.

In *Blackburn* v. *Portland Gold Mining Company*, 175 U. S. 571, and *Shoshone Mining Company* v. *Rutter*, 177 U. S. 505, we held that a suit

brought in support of an adverse claim under the Revised Statutes, sections 2325, 2326, was not a suit arising under the laws of the United States in such a sense as to confer jurisdiction on the Federal court regardless of the citizenship of the parties.

It is conceded by counsel on both sides that those decisions are controlling, unless the Circuit Court was entitled to maintain jurisdiction by taking judicial notice of the fact "that the Mountain View lode claim was located upon what had been or was an Indian reservation," and "of the act of Congress declaring the north half of the reservation, upon which the claim was located, to have been restored to the public domain;" notwithstanding no claim based on these facts was stated in the complaint. But the Circuit Court could not make plaintiffs' case other than they made it by taking judicial notice of facts which they did not choose to rely on in their pleading. The averments brought no controversy in this regard into court, in respect of which resort might be had to judicial knowledge. Thayer, Treatise on Evidence, ch. VII; *Oregon &c. Railway* v. *Skottowe*, 162 U. S. 490.

In *Spokane Falls Railroad Company* v. *Ziegler*, 167 U. S. 65, plaintiff alleged in his complaint that he was in possession, as a pre-emptor, of a tract of land, and entitled to a patent for the same from the United States; that the defendant company, being a corporation of the Territory of Washington, had seized a strip of his land and appropriated it for railroad purposes without his consent and without having compensated him therefor; but that the entry on and seizure of the land was under and pursuant to the laws of the Territory of Washington authorizing railroad companies to appropriate land for right of way for railroad tracks. As we had judicial knowledge that the authority of the territory to legislate in respect of the right of a territorial railroad corporation to enter upon the public lands of the United States was derived from the act of Congress of March 3, 1875, we held that the plaintiff's complaint disclosed the case of a contest between a settler claiming title under the laws of the United States and a railroad company claiming a right under an act of Congress. The case before us affords no such basis for sustaining the jurisdiction.

In *Powell* v. *Brunswick County*, 150 U. S. 433, 440, we said: "If it appear from the record by clear and necessary intendment that the Federal question must have been directly involved so that the State court could not have given judgment without deciding it, that will be sufficient; but resort cannot be had to the expedient of importing into the record the legislation of the State as judicially known to its courts, and holding the validity of such legislation to have been drawn in question, and a decision necessarily rendered thereon, in arriving at conclusions upon the matters actually presented and considered." And see *Yazoo &c. Co.* v. *Adams*, 180 U. S. 41.

The result is that the judgment of the Circuit Court of Appeals must be reversed; the judgment of the Circuit Court must be also reversed, and the cause be remanded to that court with a direction to remand it to the State court, the costs of this court and of the other courts to be paid by the Mountain View Mining and Milling Company.

So ordered.

True copy.

Test:

Clerk Supreme Court, U. S.